

340937-III
(consolidated with 345960-III)

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BEN ALAN BURKEY, APPELLANT

IN RE PERSONAL RESTRAINT OF BEN ALAN BURKEY,
PETITIONER.

APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 2

III. STATEMENT OF THE CASE 3

IV. ARGUMENT 9

 A. WHERE BURKEY STATED HE WAS DEATHLY AFRAID OF THE VIOLENT TENDENCIES OF CODEFENDANT TESCH AT THE TIME OF THE MURDER, THE FACT THAT BURKEY HAD HEAD-BUTTED TESCH’S GIRLFRIEND IN CLOSE PROXIMITY TO THE TIME OF THE MURDER WAS RELEVANT TO BURKEY’S CLAIM OF FEAR OF TESCH..... 9

 B. A CRIMINAL DEFENDANT ALLEGING FOR THE FIRST TIME ON APPEAL THAT HIS CONSTITUTIONAL RIGHT TO UNANIMOUS VERDICT WAS VIOLATED MUST DEMONSTRATE THE EXISTENCE OF MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT..... 13

 1. Manifest error..... 16

 2. Waiver by invited error and trial tactics..... 20

 Invited error..... 20

 Trial tactics..... 23

 3. Harmless error..... 26

C. THE TRIAL COURT CORRECTLY HELD THAT EVIDENCE OF ANY AGREEMENT BETWEEN THE STATE AND WITNESS PATTY LASCELLES WAS PART OF HER RECORD AND EASILY DISCOVERABLE BY THE DEFENDANT SUCH THAT DEFENDANT SHOULD HAVE KNOWN ABOUT THE AGREEMENT; THE EVIDENCE OF THE PLEA AGREEMENT WAS NOT MATERIAL UNDER *BRADY* AS THE EVIDENCE OF THE AGREEMENT WOULD NOT HAVE CHANGED THE OUTCOME OF THE TRIAL GIVEN THE SPECIFIC FACTS IN THIS RECORD. 27

D. THE TRIAL COURT ERRED BY NOT SETTING ASIDE BURKEY’S CONVICTIONS FOR FIRST DEGREE KIDNAPPING (COUNT II) AND FIRST DEGREE ROBBERY (COUNT IV) AFTER FINDING THESE CONVICTIONS MERGED WITH HIS FIRST DEGREE MURDER CONVICTION (COUNT I)..... 31

E. THE TRIAL COURT ERRED IN IMPOSING 36-MONTH TERMS OF COMMUNITY CUSTODY ON BURKEY’S CONVICTIONS FOR FIRST DEGREE MURDER (COUNT I) AND FIRST DEGREE ASSAULT (COUNT VI)..... 33

F. THE AMENDED JUDGMENT AND SENTENCE MUST BE CORRECTED TO INDICATE THAT BURKEY WAS FOUND GUILTY OF FIRST DEGREE MURDER (COUNT I) UNDER RCW 9A.32.020(1)(C), RATHER THAN UNDER RCW 9A.32.020(1)(A). 33

V. CONCLUSION OF APPEAL ISSUES..... 34

VI. RESPONSE TO PERSONAL RESTRAINT PETITION..... 35

A. BURKEY’S CLAIM THAT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED BECAUSE HIS ATTORNEY REPRESENTED A POTENTIAL TRIAL WITNESS IS UNSUPPORTABLE WHERE THIS WITNESS WAS NOT CALLED AS A WITNESS IN HIS FIRST TRIAL, THE REPRESENTATION OF THIS WITNESS INVOLVED A TOTALLY SEPARATE MATTER, AND THE REPRESENTATION CONCLUDED BEFORE BURKEY’S SECOND TRIAL..... 35

1. Standard of review for alleged conflicts of interest. 39

2. Discussion. 40

B. BURKEY’S CLAIM THAT HIS CONVICTIONS MUST BE SET ASIDE BECAUSE HIS GIRLFRIEND PRESENTED PERJURED TESTIMONY AT TRIAL FAILS TO ESTABLISH EITHER THAT PERJURY OCCURRED OR THAT THERE IS A REASONABLE LIKELIHOOD THAT THE FALSE TESTIMONY COULD HAVE AFFECTED THE JUDGMENT OF THE JURY. 45

C. BURKEY’S CLAIM HE WAS DENIED HIS STATE AND FEDERAL RIGHT TO A FAIR TRIAL WITH DUE PROCESS WHEN THE TRIAL COURT ERRED BY PRESENTING A JURY INSTRUCTION THAT WAS AMBIGUOUS AND MISSTATED THE LAW IS WITHOUT MERIT. 48

D. BURKEY’S CLAIM HIS RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE STATE’S IMPROPER CLOSING IS ALSO WITHOUT MERIT. 48

VII. CONCLUSION TO PERSONAL RESTRAINT PETITION..... 50

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>In re Pers. Restraint of Benn</i> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	30, 46, 47
<i>In re Pers. Restraint of Gentry</i> , 137 Wn.2d 378, 972 P.2d 1250 (1999).....	30
<i>In re Pers. Restraint of Gentry</i> , 170 Wn.2d 711, 245 P.3d 766 (2010).....	47
<i>In re Pers. Restraint of Gomez</i> , 180 Wn.2d 337, 325 P.3d 142 (2014).....	39
<i>In re Pers. Restraint of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	37
<i>In re Pers. Restraint of Wheeler</i> , 188 Wn. App. 613, 354 P.3d 950 (2015).....	47
<i>In re Pers. Restraint of Yates</i> , 180 Wn.2d 33, 321 P.3d 1195 (2014).....	37
<i>In re the Detention of Gaff</i> , 90 Wn. App. 834, 954 P.2d 943 (1998).....	22
<i>Matter of Moncada</i> , 197 Wn. App. 601, 391 P.3d 493 (2017).....	37
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988)	49
<i>State v. Bennett</i> , 42 Wn. App. 125, 708 P.2d 1232 (1985).....	13
<i>State v. Burkey</i> , 187 Wn. App. 1031, 2015 WL 2452631 (2015).....	3, 27
<i>State v. Carson</i> , 179 Wn. App. 961, 320 P.3d 185 (2014), <i>aff'd</i> , 184 Wn.2d 207, 357 P.3d 1064 (2015)	20, 23, 48
<i>State v. Castellanos</i> , 132 Wn.2d 94, 935 P.2d 1353 (1997)	11

<i>State v. Coombes</i> , 191 Wn. App. 241, 361 P.3d 270 (2015), review denied, 185 Wn.2d 1020, 369 P.3d 500 (2016).....	33
<i>State v. Corbett</i> , 158 Wn. App. 576, 242 P.3d 52 (2010).....	20
<i>State v. Crane</i> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	18
<i>State v. Cronin</i> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	48
<i>State v. Davila</i> , 184 Wn.2d 55, 357 P.3d 636 (2015).....	28, 29
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	40, 41, 42, 49
<i>State v. Fiallo-Lopez</i> , 78 Wn. App. 717, 899 P.2d 1294 (1995).....	19
<i>State v. Frohs</i> , 83 Wn. App. 803, 924 P.2d 384 (1996).....	32
<i>State v. Gefeller</i> , 76 Wn.2d 449, 458 P.2d 17 (1969).....	12, 13
<i>State v. Gordon</i> , 172 Wn.2d 671, 260 P.3d 884 (2011).....	16
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	30
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	26, 44
<i>State v. Handran</i> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	18, 19
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	20
<i>State v. James</i> , 48 Wn. App. 353, 739 P.2d 1161 (1987).....	39
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	50
<i>State v. Locke</i> , 175 Wn. App. 779, 307 P.3d 771 (2013), review denied, 179 Wn.2d 1021 (2014).....	17
<i>State v. McChristian</i> , 158 Wn. App. 392, 241 P.3d 468 (2010).....	25, 26
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	49
<i>State v. McNearney</i> , 193 Wn. App. 136, 373 P.3d 265 (2016).....	19

<i>State v. Mullen</i> , 171 Wn.2d 881, 259 P.3d 158 (2011).....	30
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	17
<i>State v. Parmelee</i> , 108 Wn. App. 702, 32 P.3d 1029 (2001).....	32
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984)	18, 26
<i>State v. Phelps</i> , 113 Wn. App. 347, 57 P.3d 624 (2002)	20
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984)	50
<i>State v. Regan</i> , 143 Wn. App. 419, 177 P.3d 783 (2008).....	39, 44
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 713 (2000).....	48
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	16
<i>State v. Statler</i> , 160 Wn. App. 622, 248 P.3d 165 (2011).....	44
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	14, 15, 16
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	30
<i>State v. Winings</i> , 126 Wn. App. 75, 107 P.3d 141 (2005)	22
<i>State v. Zumwalt</i> , 119 Wn. App. 126, 82 P.3d 672 (2003)	32

FEDERAL CASES

<i>Ball v. United States</i> , 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)	32
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)	39
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)	40, 42
<i>Strickler v. Greene</i> , 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)	28
<i>United States v. Mers</i> , 701 F.2d 1321 (11th Cir. 1983).....	39

<i>United States v. Olano</i> , 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).....	14
--	----

STATUTES

RCW 9A.32.020.....	33
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RULES

CrR 7.8.....	34
ER 401	12
ER 403	12
Fed. R. Crim. P. 51	14
Fed. R. Crim. P. 52	14
RAP 2.5.....	14, 15, 16, 17
RAP 10.3.....	47
RAP 16.10.....	47

OTHER

1841 DICKENS <i>Old Curiosity Shop</i> II. lxvi. 177	25
5 TEGLAND, <i>Washington Practice, Evidence</i> (5th ed. 2007)	11, 12
Black's Law Dictionary (8th ed. 1999)	34

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence that Burkey head-butted Marlana Panessa.

2. The trial court violated Burkey's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for first degree assault (count VI).

3. The trial court erred by denying Burkey's motion for a new trial based on the State's failure to disclose its plea agreement with Patty Lascelles to defense counsel.

4. The trial court erred by not setting aside Burkey's convictions for first degree kidnapping (count II) and first degree robbery (count IV) after finding these convictions merged with his first degree murder conviction (count I).

5. The trial court erred by imposing deadly weapon enhancements on Burkey's merged convictions for first degree kidnapping (count II) and first degree robbery (count IV).

6. The trial court erred in imposing 36-month terms of community custody on Burkey's convictions for first degree murder (count I) and first degree assault (count VI), and an 18-month term of community custody on Burkey's merged first degree robbery conviction (count IV).

7. The amended judgment and sentence must be corrected to indicate that Burkey was found guilty of first degree murder (count I) under RCW 9A.32.020(1)(c), rather than under RCW 9A.32.020(1)(a).

8. An award of costs on appeal against the defendant would be improper.

II. ISSUES PRESENTED

1. Where Burkey stated he was deathly afraid of the violent tendencies of codefendant Tesch at the time of the murder, was the fact that Burkey had head-butted Tesch's girlfriend in close proximity to the time of the murder relevant to Burkey's claim of fear of Tesch?

2. Should the trial court have *sua sponte* supplied a *Petrich* instruction on an assault allegation where the assault was continuing in nature, and was any error in failing to provide such an instruction was unpreserved, invited by the defendant, and a trial tactic?

3. Did the trial court correctly determine there was no *Brady* violation regarding the disclosure of an agreement between the State and witness Patricia ("Patty") Lascelles where such agreement was part of her record and easily discoverable by the defendant such that defendant should have known about the agreement; and where the evidence of the plea agreement was not material under *Brady* as the evidence of the agreement

would not have changed the outcome of the trial given the specific facts in this case?

4. The state concedes Burkey's convictions for first degree kidnapping (count II) and first degree robbery (count IV) merged with his first degree murder conviction (count I) and that these convictions, as well as their respective terms of community supervision, must be set aside. Additionally, the scrivener's error contained in the judgment and sentence should be corrected upon remand.

III. STATEMENT OF THE CASE

Defendant/appellant Benjamin Burkey was charged in the Spokane County Superior Court, along with codefendant James Tesch, with six felony counts: (1) first degree felony murder; (2) first degree kidnapping; (3) conspiracy to commit first degree kidnapping; (4) first degree robbery; (5) conspiracy to commit first degree robbery; and (6) first degree assault. CP 1, 412-14, 416-21. The matter was assigned to the Honorable John Cooney for jury trial. RP 1, *et seq.*¹

¹ The murder of Mr. Rick Tiwater occurred September 4, 2005. Burkey's trial for the murder originally occurred in June 2006. The case was reversed by this Court and remanded for retrial after a lengthy appeal because of an open court violation. "We decide the evidence amply supports each conviction, but, reverse because, considering the now well-developed case law, Burkey did not receive a public trial." *State v. Burkey*, 187 Wn. App. 1031, 2015 WL 2452631, at *1 (2015).

The body of Rick Tiwater was found in some woods near a rural road in north Spokane County. RP 184-85. His pants were down around his knees. RP 217. Physical evidence indicated that he had been beaten to death in the area. RP 215-23. His head and skin were singed. RP 391, 479-80. Injuries were inflicted to his head, chest, and hands. Most of the injuries were inflicted at about the time of death. RP 404-05. A broken mud flap was found near the body. RP 220-21, 227-28. Tire tracks were recovered from the scene. RP 221-23. The medical examiner believed that many of the injuries could have been caused by a car striking Tiwater. RP 414.

A search warrant was served on a Ford Thunderbird belonging to Burkey. RP 240. One of the four mud flaps was broken off of that vehicle; the others were similar to the flap recovered by the body. RP 240-41. A gas can was in the back of the car. RP 242. Tire treads from the car were similar to the tracks found at the scene. RP 241-42. Boot prints found at the scene also appeared to match defendant's boots. RP 238-39. Vegetation was found on the underside of the car. RP 243-44. Hair and blood also were found on the vehicle's undercarriage. RP 244-46. Blood also was found on defendant's boot. DNA testing confirmed that all those blood samples came from Tiwater. RP 431-32. DNA testing also showed that blood found on a dresser drawer in Burkey's house belonged to Tiwater. RP 431-32.

Witnesses who were present at Burkey's home the night of September 4, 2005, recounted their memory of the evening. Troy Fowler's testimony described an altercation between Tiwater and Burkey around 8:00 p.m. Burkey hit Tiwater several times and called him "a rat." Ex. 134 at 494-95.² Burkey tried to get Tiwater to sign over title to his motorcycle, but gave up on that plan when he discovered some of the serial numbers on Tiwater's bike were scratched out. Ex. 134 at 495-98, 514-17, 539-41. Fowler stated Burkey said Tesch had come over to help him "figure out" whether Tiwater was a "snitch" or not. Ex. 134 at 495, 512-14. Fowler left before Tesch arrived. Ex. 134 at 498.

The next day Burkey left Fowler a message that he was "looking" for Fowler had "fucked up." He then told Fowler that he had gone "golfing" that night and that Tiwater fell into a campfire and would never be returning. Ex. 134 at 499-500.

Burkey's live-in girlfriend, Ms. Lascelles, testified at some length. She told jurors that Tiwater rode his motorcycle over to the Lascelles-Burkey residence on September 4. Ex. 134 at 530-32. Tiwater refused to sign the motorcycle over to Burkey. Ex. 133 at 540-41, 601-02.

² Redacted transcripts of testimony from the first trial of witnesses Patricia Lascelles, Troy Fowler, and Billy Shumaker, along with the testimony of defendant were entered as exhibits for the record and read to the jury. The page numbers correspond to the transcript page in those exhibits for ease of reference.

Ms. Lascelles claimed not to see Burkey strike Tiwater. She did, however, agree that Tiwater suffered injuries while in her kitchen. Ex. 133 at 533, 538. Burkey sent her over to get Tesch three times. Ex. 133 at 533-37. Tesch came over after 11:30 p.m. Ex. 133 at 545.

She described how Tesch kicked Tiwater to the floor and then dragged him into the kitchen. Ex. 133 at 545-47. There, Tesch hit Tiwater on the head with a hammer. The blow apparently rendered Tiwater unconscious; Tesch placed him on a chair. Ex. 133 at 545-48, 605-08. There was a lot of blood on the floor, walls, and cupboards in the room. Ex. 133 at 550, 562-65. Ms. Lascelles did not implicate Burkey in the attack. Ex. 133 at 574, 609.

Burkey drove Tiwater's motorcycle to another friend's house. Ms. Lascelles followed in her car and then drove Burkey back after he had parked the motorcycle in the backyard. Ex. 133 at 551-54. When they returned, Tesch walked Tiwater to Ms. Lascelles' Thunderbird and placed him in the backseat. Tiwater was unconscious. Tesch drove the vehicle away with Burkey in the passenger seat. Ex. 133 at 560-62, 611-14.

Burkey and Tesch returned to the house about daybreak. Burkey had blood on his coat and clothing. Tesch brought along some of Tiwater's clothing and a golf club; the club had blood on it. Ex. 133 at 566-70. Burkey

had Ms. Lascelles burn the clothing and wash the Thunderbird. RP 249; Ex. 133 at 570-71, 577.

Videotape showed that a man who looked like Tesch drove the Thunderbird to a gas station about 5:00 a.m. on September 5, 2005. Burkey was positively identified as the passenger in the car. RP 283-85.

Burkey eventually was arrested. He spoke to detectives on several occasions. Prior to his arrest on September 16, he initially told police that he had not seen Tiwater since September 3, 2005. RP 296, 322. On September 26, he next told a detective that Tiwater was at his place on September 4 and that he had seen Terrance Kinard³ and other “black men” watching the house. He called Tesch for “back-up.” However, Tesch did not like Tiwater and eventually assaulted him. He and Tesch then decided to drive Tiwater home, but instead Tesch drove up north and assaulted and killed Tiwater. RP 463-70.

In a later interview on October 5, 2005, he told officers that he was not responsible but that he had been present. He also told them that Tiwater had come over to swap motorcycles and that they had not fought. When detectives stated they had contrary information, Burkey admitted he might

³ Kinard was actually in jail on September 4, 2005. RP 463.

have done so. He blamed Tesch for the killing and believed Tesch was setting him up for the crime. RP 298-302.

Defendant testified in his own behalf in the first trial, which testimony was read to the jury. Exs. 136, 137. Burkey had known Tesch since his days as an associate of a motorcycle gang. Ex. 136 at 778-80. Burkey admitted slapping Tiwater and claimed the confrontation was about Tiwater using drugs in front of children. Ex. 136 at 798-800. He stated that Tesch murdered Tiwater on his own and had threatened the lives of Burkey and his son if Burkey did not cooperate in covering up the crime. Ex. 136 at 15, 18-31, 34-38.

The prosecution argued the case to the jury on a theory of joint action by Burkey and Tesch. RP 578-96, 635-46. Defense counsel argued that Tesch committed the killing and that all Burkey did was help dump the body and dispose of evidence after the fact out of fear for the safety of his family. RP 607-33. The jury disagreed and found defendant guilty on all six counts. The jury also found that Burkey was armed with a deadly weapon during the crimes. RP 656-58; CP 266-70.

The parties agreed that the robbery and kidnapping convictions did not count in scoring the other offenses and that defendant's offender score exceeded nine based on prior criminal history. RP 677-78.

IV. ARGUMENT

A. WHERE BURKEY STATED HE WAS DEATHLY AFRAID OF THE VIOLENT TENDENCIES OF CODEFENDANT TESCH AT THE TIME OF THE MURDER, THE FACT THAT BURKEY HAD HEAD-BUTTED TESCH'S GIRLFRIEND IN CLOSE PROXIMITY TO THE TIME OF THE MURDER WAS RELEVANT TO BURKEY'S CLAIM OF FEAR OF TESCH.

Burkey claimed to Sergeant Marske that he did not assist Tesch in the murder of Tiwater. RP 300-02. Burkey claimed that Tesch violently killed Tiwater and Burkey was afraid to name Tesch or, inferentially, to intercede to prevent the murder that occurred in Burkey's presence. *Id.* On cross-examination of Sergeant Marske, counsel established that Burkey claimed he was afraid of Tesch; that Tesch would kill Burkey's son. RP 316. Similarly on cross-examination of Detective Ricketts, counsel established that Burkey claimed he was afraid Tesch would put him in a coffin:

Q (By Bevan Maxey) And on that occasion did he tell you if he told you what he knew he felt he would end up in a coffin?

A (By Detective Ricketts) Let me find that report. I believe I printed it out.

Q Okay.

A Yes, he did.

RP 333.

The State sought to impeach Burkey's statements of claimed fear of Tesch through the testimony of Tesch's girlfriend, Marlana Panessa, that

Burkey had head-butted her earlier on the day of the murder, with Tesch present. RP 339-44. The State argued this evidence was relevant as to Burkey's claimed fear of Tesch. RP 339-40. The State argued counsel for Burkey, in his cross-examination of the State's preceding witnesses, had brought out evidence that Burkey was afraid of Tesch. RP 339-40, 342, 346.

Defendant objected, claiming "the rules of 404, 405, 403, the probative value has to outweigh the prejudicial value and I think this is extremely prejudicial. It has nothing to do with the allegations that we're dealing with." RP 341.

The trial court ruled the fact that Burkey had head-butted Tesch's girlfriend, in front of Tesch, in Tesch's home, was relevant to Burkey's claimed fear of Tesch:

THE COURT: Thank you. The issue here is whether the probative value of that testimony outweighs the prejudicial effect on the defendant. That testimony is specifically an alleged assault that occurred between Mr. Burkey and Ms. Panessa in the presence of Mr. Tesch, who is/was Ms. Panessa's boyfriend at the time. It allegedly happened on September 5th. The state wants to introduce that to show that Mr. Burkey wasn't -- possibly wasn't fearful of Mr. Tesch as he allegedly assaulted Mr. Tesch's girlfriend in his presence.

There was a lot of testimony presented yesterday through the detective that Mr. Burkey made statements about his fear of Mr. Tesch, that he was afraid Mr. Tesch would kill his son and put him in a coffin. Because that was raised, I think this event, although prejudicial, is probative to show the reasonableness of his fears.

So the Court will find that the probative value does outweigh the prejudice for that reason and will allow the State to delve into that provided that the facts as indicated by Mr. Cipolla are correct. So if you'll verify that with the witness prior to eliciting that testimony.

RP 343-44.

After defendant's counsel further complained regarding the timing of the head-butt that occurred on the same day as the murder, the court maintained its earlier ruling:

THE COURT: The Court's understanding is that this happened in close proximity to the time that Mr. Tiwater was killed and therefore it is relevant to show whether or not Mr. Burkey would be -- Burkey would be reasonably in fear of Mr. Tesch. So the Court will maintain its earlier ruling.

RP 346-47. The trial court's reasoning was sound.

"Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). "When applying Rule 403, the burden is on the party seeking to exclude the evidence." 5 TEGLAND, *Washington Practice, Evidence* § 403.2 (5th ed. 2007), citing *Carson v. Fine*, 123 Wn.2d 206 (there is a presumption of admissibility under Rule 403). As Tegland notes, "[n]early all evidence is prejudicial in the sense that it is offered for the purpose of inducing the trier of fact to reach one conclusion and not another.

Nothing in ER 403 authorizes exclusion of evidence because it is ‘too probative.’” TEGLAND, § 403, at 440, citing *State v. Israel*, 113 Wn. App. 243, 54 P.2d 1218 (2002).

The head-butting evidence is relevant in that few men allow other men to head-butt their wives or girlfriends.⁴ ER 401. A trial court could reasonably find that this evidence is probative of the defendant’s fear of Tesch. ER 403. If the defendant was afraid of Tesch, he may not have wished to anger him by head-butting his girlfriend while Tesch was observing him, in Tesch’s house, on the same day as the murder.

This evidence of Burkey’s alleged fear of Tesch was developed by the defendant during his cross-examination of Sergeant Marske and Detective Ricketts. RP 316, 332-33. By doing so, the defendant opened the door to further inquiry regarding his fear of Tesch. The most quoted case dealing with the “open door rule,” and the one cited by TEGLAND, *supra*, is *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969), where our State Supreme Court explained:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the

⁴ Nor do women generally allow some other female to head-butt their husbands or boyfriends.

matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455. Defendant's counsel opened up the issue of defendant's fear of Tesch when he twice inquired regarding Burkey's fear of Tesch, of Tesch putting him or relatives in a coffin. Those inquiries made the issue of his fear impeachable. The trial court has discretion to admit evidence that otherwise might be inadmissible if the defendant opens the door to the evidence. *State v. Bennett*, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985) (citing *Gefeller*, 76 Wn.2d at 455; *State v. Olson*, 30 Wn. App. 298, 633 P.2d 927 (1981)). The trial court committed no error in this regard.

B. A CRIMINAL DEFENDANT ALLEGING FOR THE FIRST TIME ON APPEAL THAT HIS CONSTITUTIONAL RIGHT TO UNANIMOUS VERDICT WAS VIOLATED MUST DEMONSTRATE THE EXISTENCE OF MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT.

Burkey contends for the first time on appeal that he was denied his right to a unanimous jury verdict under the Sixth Amendment of the United States Constitution because the State presented evidence of more than one first degree assault and did not elect which act it was relying on to support the conviction; that further, the trial court failed to instruct the jury on the

requirement of unanimity. However, RAP 2.5 bars review of the issue because any error in this regard was not manifest as required under that rule, where, as here, no election or unanimity instruction was required because the assaultive acts constituted a continuing course of conduct culminating in the death of the victim, Tiwater. Additionally, any error in this regard was invited by the defendant and was harmless.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim. P. 51 and 52,⁵ and in Washington under RAP 2.5.

⁵ **Rule 52. Harmless and Plain Error**

(a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

In *United States v. Olano*, 507 U.S. 725, 734-35, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the Court analyzed the Rule, explaining:

When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called “harmless error” inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *State v. Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the

prejudicial. *See, Young, supra*, 470 U.S., at 17, n. 14, 105 S.Ct., at 1047 n. 14 (“[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error ... had [a] prejudicial impact on the jury’s deliberations”). This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error “does *not* affect substantial rights” (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* “affec[t] substantial rights.” *See also*, Note, *Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Reserved*, 23 MISS.L.J. 42, 57 (1951) (summarizing existing law) (“The error must be real and such that it probably influenced the verdict”).

prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

State v. Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988), quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff’d in part, rev’d in part*, 99 Wn.2d 663, 664 P.2d 508 (1983).

1. Manifest error.

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.” However, the failure to provide a required unanimity instruction is manifest only where it had “practical and identifiable consequences” at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (internal quotation marks omitted) (quoting *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)).

“Each of these requirements demands that the alleged action, in this case the omission of a unanimity instruction, in fact be in error.” *State v. Locke*, 175 Wn. App. 779, 802, 307 P.3d 771 (2013), *review denied*, 179 Wn.2d 1021 (2014).

Here, any error relating to the trial court’s failure to *sua sponte* supply a *Petrich* instruction was not manifest or obvious, as is required by RAP 2.5 and *State v. O’Hara*:

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. *See Harclaon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

O’Hara, 167 Wn.2d at 99-100.

There is nothing in appellant’s claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that a judge trying the case could not have failed to ascertain a *Petrich* violation. This is because no election or unanimity instruction is required in

cases like the instant one, where the evidence establishes a “continuing course of conduct.” *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984).

In *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991), the court found that the continuing course of conduct exception applied where a victim died of injuries inflicted during a specific two-hour period. *Crane*, 116 Wn.2d at 326-30. The court said that *Petrich* did not apply because the evidence supported “only a small time frame in which the fatal assault could have occurred.” *Id.* at 330. Similarly, in *State v. Handran*, 113 Wn.2d 11, 775 P.2d 453 (1989), the court found that the continuing course of conduct exception applied because the defendant, who was charged only with burglary, broke into his ex-wife’s residence and repeatedly assaulted her at the same place during a short period and for the same purpose (to obtain sex). *Handran*, 113 Wn.2d at 17-18.

In the instant case, placing ourselves in the shoes of the trial court, it was not at all apparent that the continuing assaults must be viewed as separate acts, as opposed to a continuing course of conduct. The State’s theory of the case was that Burkey requested Tesch to come over so that the two of them could rid themselves of a snitch; that as an accomplice, Burkey aided Tesch in the beating, abducting, and murder of Tiwater as a planned course of conduct.

The evidence that the defendant engaged “in a series of actions intended to secure the same objective” indicates a continuing course of conduct. *See State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). In determining whether an act is one of several distinct criminal acts or part of a continuing course of conduct the facts must be evaluated in a commonsense manner. *Handran*, 113 Wn.2d at 17. The victim never left the company of Burkey or Tesch from the time of his arrival until his final demise. Burkey wanted to dispose of a “snitch” and take his motorcycle in the process. This he accomplished. The assaultive events constituted a continuing course of conduct toward a common goal. The resolution of the issue as to whether the instant case involves a continuing course of conduct, or involves a *Petrich* error, may be open to debate, as is whether the belatedly claimed error is a result of trial tactics and waiver - therefore the error is not obvious or manifest. *See State v. McNearney*, 193 Wn. App. 136, 373 P.3d 265 (2016) (If error occurred, “Mr. McNearney has failed to demonstrate that it was manifest.” *Id.* at 142). This court should decline the invitation to address the unpreserved argument claiming that the trial court should have *sua sponte* supplied a *Petrich* instruction in the instant case.

2. Waiver by invited error and trial tactics.

Invited error.

The invited error doctrine precludes appellate review of an alleged error affecting even a constitutional right of a defendant. *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). “The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create.” *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), *aff’d*, 184 Wn.2d 207, 357 P.3d 1064 (2015). Specifically, where a defendant’s proposed instructions do not include a unanimity instruction, the invited error doctrine precludes the defendant from appealing the trial court’s failure to give such an instruction. *See State v. Corbett*, 158 Wn. App. 576, 591-92, 242 P.3d 52 (2010) (noting defendant did not comply with ER 615(c), failed to object to the jury instructions, and proposed instructions, therefore error was invited); *State v. Phelps*, 113 Wn. App. 347, 353, 57 P.3d 624 (2002) (“The invited error doctrine applies ... where the defendant engaged in some affirmative action by which he knowingly and voluntarily set up the error”); *see also Henderson*, 114 Wn.2d at 870-71 (applying the invited error doctrine even when the alleged error is of constitutional magnitude).

Here, defendant’s counsel *agreed* with the wording of some instructions and objected to others as the trial court addressed each

instruction seriatim.⁶ Defendant's counsel also included his own instruction that sought to modify WPIC 10.51 setting forth accomplice liability. RP 542-53; CP 118-19. He claimed that the instruction should not just state "the crime," but should include the added language italicized "A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the *specific crime charged*," thereby adding exactitude to the finding required by the jury. After discussion, the trial court adopted the defendant's accomplice liability instruction. RP 543. However, while cognizant of the importance of the accomplice liability instruction, defendant's counsel affirmatively stated he had no objection to the assault instruction⁷ as presented.

THE COURT: The next instruction is the "to convict" for first degree assault. Does the defense have an objection to that instruction?

MR. MAXEY: No, Your Honor.

RP 547.

Later, after the court modified the instructions discussed above, the trial court asked Burkey's counsel if the instructions were acceptable and

⁶ See RP 538-54. Defense counsel objected to the "to-convict" instruction for first degree murder, RP 540, as well as an instruction listing what the defendant was charged with. RP 548-49. Some other instructions were withdrawn by the State after discussion.

⁷ CP 254.

counsel responded that the instructions looked okay, that he had no further objections or additions.

THE COURT: Mr. Maxey, do you have any other objections or additions to the instructions that have been provided?

MR. MAXEY: I have no further objections, Your Honor, other than what I previously stated. I believe this is what the Court indicated.

RP 555.

The invited error doctrine applies in this situation. “Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction *or agreed to its wording.*” *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (emphasis added); *see also In re the Detention of Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998) (holding that the parties’ agreement as to the wording of a jury instruction precluded the court’s review of the omission of the instruction).

Defense counsel’s comments were the equivalent to agreeing to the exclusion of a unanimous jury instruction from the trial court’s instructions. Burkey did not propose a unanimity instruction and agreed to the trial court’s jury instructions that did not include a unanimity instruction. Therefore, the invited error doctrine prohibits Burkey from challenging on appeal the trial court’s failure to give such an instruction.

Trial tactics.

Additionally, our appellate courts have previously held that the failure of defense counsel to request a *Petrich* instruction may be the result of a legitimate trial tactic. *See Carson*, 179 Wn. App. 961 (holding that in a multiple acts/multiple counts case where the State proposed a *Petrich* instruction, defense counsel's objection to the instruction was a legitimate trial tactic, finding that a *Petrich* instruction could be confusing and potentially prejudicial especially where the defense's theory of the case was that the allegations were altogether fabricated).

As in *Carson*, here Burkey's defense was an all or nothing strategy - Tesch was responsible for all of the crimes and Burkey was merely a fearful observer, not an accomplice to any of these activities. This position was repeated throughout Burkey's closing arguments: it was Tesch that was responsible for the assaults and murder.

Defense counsel's closing argument discussed the facts presented, arguing such facts established that the only physical contact Burkey had with Tiwater may have resulted in a minor "cut lip or something" which certainly "did not contribute to Mr. Tiwater's demise in this particular case." RP 615. He then laid out why the evidence showed "Mr. Burkey never wanted to keep this man's bike and nobody really said that. They were going to trade." RP 617. Burkey's counsel then artfully laid all of the blame

at the feet of Tesch, describing how Tesch stormed into the home unannounced, and “put the boots to him as [State’s] counsel indicated. He threw him to the floor. Tesch did. Tesch pulled him out of the chair and kicked him in the stomach. Tesch picked him up and dragged him to into the kitchen. What was Burkey doing? He was telling him to stop.” RP 620.

He continued:

That’s what the testimony that you got to that transcript. That’s not an agreement. That’s not proof that somebody was wanting to kidnap him or wanting to assault him. That’s quite the opposite. That’s not being an accomplice or wanting to assist. But he was present just like Ms. Lascelles was present.

RP 620.

Burkey’s counsel also argued that it was Tesch who took Tiwater to the vehicle, not Burkey; that Tesch ordered Burkey into the car; and that Burkey believed they were taking Tiwater home. RP 621-22. Burkey’s counsel established the golf clubs used in the assault came from Tesch’s house, and that Burkey was afraid for his family and was merely present - not an accomplice. RP 624-31.

The defendant’s above argument may have had one flaw, undiscovered by the prosecutor, and a flaw that could have been revealed had defendant requested a unanimity instruction. The defendant adeptly finessed the prosecutor and court in the instruction phase of the trial by

obtaining the trial court and prosecutor’s approval to his modified accomplice instruction containing the language “with knowledge that it will promote or facilitate the commission of the *specific* crime *charged*,” language that would require accomplice liability for the first degree assault to be predicated on aid rendered to facilitate a first degree assault, not just any assault. This instructional language was contrary to the law on the accomplice liability for an assault, and prevented the State from arguing that as to the misdemeanor assault, if the defendant was “in for a dime, he was in for a dollar.”⁸ See *State v. McChristian*, 158 Wn. App. 392, 401, 241 P.3d 468 (2010):

Contrary to McChristian’s contention, the State was not required to prove that he had knowledge that the principal intended to assault Williams with a deadly weapon. Instead, the State needed to prove only that McChristian knew that the principal intended to commit an assault generally. By facilitating the assault on Williams, McChristian ran the risk that an accomplice would elevate the assault to a first degree offense. See *Davis*, 101 Wn.2d at 655, 682 P.2d 883 (accomplice’s use of a firearm elevated robbery to first degree offense). Accordingly, the prosecutor’s closing arguments regarding accomplice liability were proper, did not lower the State’s burden of proof to convict McChristian

⁸ Most likely a translation of “in for a penny, in for a pound.” The saying means that once something has started—even a little—that party is stuck until the end. See 1841 DICKENS *Old Curiosity Shop* II. lxvi. 177 “Being in for a penny, I am ready as the saying is to be in for a pound.” Some say the American idiom was used by U.S. Secretary of Defense Robert McNamara (1916-2009) to describe the Vietnam War.

for first degree assault as an accomplice, and did not constitute misconduct.

McChristian, 158 Wn. App. at 401. By requiring the State to prove that the defendant was an accomplice in a *specific* first degree assault, he avoided a more generalized argument that Burkey's participation in the minor assault established his accomplice participation in the greater. Defense counsel realized that if he was an accomplice to any assault, he would be considered an accomplice to the first degree assault under the above facts, and his fear-of-Tesch defense to the murder charge would falter. Therefore, it was advantageous to not have the State reexamine the instructions and concentrate on Burkey's participation levels beginning with the minor assault at the house - a choice of trial tactics. *Cf. State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) (after carefully reviewing the evidence and defendant's arguments, and finding defendant's arguments were supported by the factual record, the all-or-nothing approach was a reasonable trial tactic, and counsel was not deficient for failing to request a lesser included instruction to the second degree murder charge).

3. Harmless error.

Even if the acts were characterized as distinct, the error is harmless if a rational trier of fact could have found each incident proved beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 573. The record shows substantial evidence of the assault in the home and at the outdoor murder scene. The

evidence overwhelmingly established that Burkey obtained the presence and assistance of Tesch, hailing him over to the Burkey residence to assist in the determination of whether Tiwater should be treated as a snitch. As the above record substantiates, there was abundant evidence supporting each claimed separate act, the assault at the home after Burkey obtained Tesch's presence and assistance, then the evidence of the death outdoors. Any claimed lack of jury unanimity did not violate Burkey's right to a unanimous jury verdict and was harmless in any event.

C. THE TRIAL COURT CORRECTLY HELD THAT EVIDENCE OF ANY AGREEMENT BETWEEN THE STATE AND WITNESS PATTY LASCELLES WAS PART OF HER RECORD AND EASILY DISCOVERABLE BY THE DEFENDANT SUCH THAT DEFENDANT SHOULD HAVE KNOWN ABOUT THE AGREEMENT; THE EVIDENCE OF THE PLEA AGREEMENT WAS NOT MATERIAL UNDER *BRADY* AS THE EVIDENCE OF THE AGREEMENT WOULD NOT HAVE CHANGED THE OUTCOME OF THE TRIAL GIVEN THE SPECIFIC FACTS IN THIS RECORD.

On appeal from the original trial, in an unpublished opinion issued in May 2015, this Court reversed Burkey's convictions and remanded his case for a new trial, finding that his constitutional right to a public trial was violated during voir dire. CP 73-84.⁹ Mr. Bevan Maxey represented Burkey on that appeal and throughout the second trial. Mr. Maxey also attacked the

⁹ *Burkey*, 187 Wn. App. 1031.

sufficiency of the evidence in the first appeal, so he had a working knowledge of the facts and witnesses.

In December 2015, a second jury trial was held, on counts I, II, III, IV, and VI. CP 231; RP 13-660; Exs. 133-37. Defendant was convicted. After the second trial, Mr. Maxey filed a motion for a new trial, claiming a *Brady* violation. He claimed that the State did not *affirmatively* make him aware of a plea agreement between Ms. Lascelles and the State, and that a retrial was warranted. Counsel submitted a brief,¹⁰ and an affidavit in support of this motion. However, Mr. Maxey did not claim he was *unaware* of the plea agreement made some ten years earlier, before the first trial. *See* CP 293-94. For that reason alone this *Brady* claim is unsupportable.

In order to establish a *Brady* violation, a defendant must establish three things: (1) “[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching,” (2) “that evidence must have been suppressed by the State, either willfully or inadvertently,” and (3) the evidence must be material. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *State v. Davila*, 184 Wn.2d 55, 69, 357 P.3d 636 (2015).

¹⁰ CP 295-301.

In the instant case, the trial court held a hearing on the motion and made factual findings and conclusions of law supporting its decision that no *Brady* violation had occurred. CP 368-69; RP 664-70. After conducting a hearing, the trial court's findings are given a degree of deference on appeal. *See Davila*, 184 Wn.2d at 74-75.

Defendant has not assigned error to any of these factual findings made by the court. The trial court found that the defense knew or should have known about the plea agreement, and that the evidence of a plea agreement would not have changed the outcome of the trial. CP 369. As such, these findings are verities on appeal. As noted in *Davila*, "Generally, [factual] findings are viewed as verities, provided there is substantial evidence to support the findings. *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 129, 857 P.2d 270." *Davila*, 184 Wn.2d at 75 fn. 5 (quoting *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

The court found that the defense knew or should have known about the plea agreement. There was no evidence offered to the contrary. Attorney Maxey had reviewed the transcripts of the prior trial in detail as he had handled the first appeal. It was obvious that all parties knew about Ms. Lascelles' charges and a simple review of that file established the fact

of the plea agreement. An inquiry of the witness also would have revealed the agreement. RP 668. There was no suppression of evidence.

Evidence is not “suppressed” if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence. *State v. Mullen*, 171 Wn.2d 881, 259 P.3d 158 (2011); *see also State v. Gregory*, 158 Wn.2d 759, 798, 147 P.3d 1201 (2006); *State v. Thomas*, 150 Wn.2d 821, 851, 83 P.3d 970 (2004); *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).

The trial court’s finding that evidence of the plea agreement would not have changed the outcome of the trial is also supported by the record and unchallenged on appeal. Ms. Lascelles’ testimony aided Burkey’s defense that he was “merely present.” She loved Burkey, and testified at his first trial. Ex. 133 at 625. Her partially redacted transcript from that trial was introduced at Burkey’s retrial. RP 436; Ex. 133. Indeed, counsel for defendant quoted from her testimony at length in his closing argument, establishing that her testimony supported Burkey’s testimony. While arguing that Burkey was talking to attorney Patrick Stiley on how to *help* Tiwater out, defense counsel pointed out that “I think Ms. Lascelles said it in her testimony that Mr. Burkey was looking out for him.” RP 611. The bike was being repossessed, not taken, because according to Ms. Lascelles,

Tiwater owed her money. *Id.* Burkey was trying to help Tiwater get the van back, and Ms. Lascelles' testimony supported that position. RP 612-13. Ms. Lascelles testified Tiwater was never told he had to stay or couldn't move, in fact he was asked to leave, and she was the only witness to this. RP 619. When Tesch arrived, Ms. Lascelles testified he was responsible for all of the assaultive contact. RP 620. Burkey was just "present just like Ms. Lascelles was present." RP 620. Ms. Lascelles testified that Burkey begged Tesch to stop assaulting Tiwater, and Burkey moved the bike to protect it, not steal it. *Id.*

Because the trial court's factual findings are unchallenged and because they are supported by the record, the trial court did not abuse its discretion by concluding that there was no *Brady* violation in the instant case.

D. THE TRIAL COURT ERRED BY NOT SETTING ASIDE BURKEY'S CONVICTIONS FOR FIRST DEGREE KIDNAPPING (COUNT II) AND FIRST DEGREE ROBBERY (COUNT IV) AFTER FINDING THESE CONVICTIONS MERGED WITH HIS FIRST DEGREE MURDER CONVICTION (COUNT I).

Burkey contends his convictions for first degree kidnapping (count II) and first degree robbery (count IV) merge with his first degree murder conviction (count I) as found by the trial court. CP 387; RP 687.¹¹

¹¹ Additionally, the State included these crimes as elements in the "to convict" instruction for the first degree murder charge. CP 238.

Burkey claims that the convictions of these two offenses must be set aside, as they merged in the conviction of the greater. It appears he is correct. The merger doctrine is a rule of statutory construction that applies where the legislature “has clearly indicated that in order to prove a particular degree of crime, ‘the State must prove not only that the defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.’” *State v. Parmelee*, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001) (quoting *State v. Frohs*, 83 Wn. App. 803, 806, 924 P.2d 384 (1996)).

Where a defendant has been found guilty of more than one crime, the convictions may merge if the court determines the legislature intended only one punishment for a single act. Here, the trial court found these crimes merged. Therefore, the convictions of merged offenses must be set aside, as they are merged or included in the conviction of the greater. *State v. Zumwalt*, 119 Wn. App. 126, 133, 82 P.3d 672 (2003). These separate convictions, apart from the concurrent sentences, have potential adverse collateral consequences that may not be ignored. Therefore, they must be set aside. *Ball v. United States*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); *State v. Frohs*, 83 Wn. App. 803, 811 n. 2, 924 P.2d 384 (1996).

In light of the above, it is axiomatic that the deadly weapon enhancements and terms of community supervision imposed on these merged convictions must also be set aside.

E. THE TRIAL COURT ERRED IN IMPOSING 36-MONTH TERMS OF COMMUNITY CUSTODY ON BURKEY'S CONVICTIONS FOR FIRST DEGREE MURDER (COUNT I) AND FIRST DEGREE ASSAULT (COUNT VI).

Defendant claims the mandatory 36-month term of community supervision imposed on both his murder and assault convictions violates the ex post facto clause. This claim is adequately supported by this Court's decision in *State v. Coombes*, 191 Wn. App. 241, 251-253, 361 P.3d 270 (2015), *review denied*, 185 Wn.2d 1020, 369 P.3d 500 (2016).

Because of the above sentencing issues, this case must be remanded for resentencing in any event.

F. THE AMENDED JUDGMENT AND SENTENCE MUST BE CORRECTED TO INDICATE THAT BURKEY WAS FOUND GUILTY OF FIRST DEGREE MURDER (COUNT I) UNDER RCW 9A.32.020(1)(c), RATHER THAN UNDER RCW 9A.32.020(1)(a).

The defendant was charged and the jury was instructed under RCW 9A.32.020(1)(c). The inclusion of an "a" rather than a "c" in his judgment and sentence was most likely a scrivener's error. Generally, scrivener's errors are clerical errors that are the result of mistake or inadvertence, especially in writing or copying something on the record. They are not errors of judicial reasoning or determination. *See Black's Law*

Dictionary 582, 1375 (8th ed. 1999). CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time of its own initiative or on the motion of any party. If this Court remands this case for resentencing, the trial court will be able to correct this scrivener's error.

V. CONCLUSION OF APPEAL ISSUES

Because Burkey stated he was deathly afraid of the violent tendencies of codefendant Tesch at the time of the murder, the fact that Burkey had head-butted Tesch's girlfriend in close proximity to the time of the murder was relevant to Burkey's claim of fear of Tesch.

This court should decline the invitation to address the unpreserved argument that the trial court should have *sua sponte* supplied a *Petrich* instruction in the instant case; the invited error doctrine prohibits Burkey from challenging on appeal the trial court's failure to give such an instruction, especially where it was a choice of trial tactics.

The trial court correctly held that evidence of any agreement between the State and witness Ms. Lascelles was part of her record and was easily discoverable by the defendant such that defendant should have known about the agreement. The evidence of the plea agreement was not material under *Brady* as the evidence of the agreement would not have changed the outcome of the trial given the specific facts in this record.

Burkey's convictions for first degree kidnapping (count II) and first degree robbery (count IV) merged with his first degree murder conviction (count I). These convictions must be set aside, as well as the terms of community supervision associated with these counts.

VI. RESPONSE TO PERSONAL RESTRAINT PETITION

A. BURKEY'S CLAIM THAT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED BECAUSE HIS ATTORNEY REPRESENTED A POTENTIAL TRIAL WITNESS IS UNSUPPORTABLE WHERE THIS WITNESS WAS NOT CALLED AS A WITNESS IN HIS FIRST TRIAL, THE REPRESENTATION OF THIS WITNESS INVOLVED A TOTALLY SEPARATE MATTER, AND THE REPRESENTATION CONCLUDED BEFORE BURKEY'S SECOND TRIAL.

Burkey claims that his right to effective assistance of counsel was denied by his trial counsel's representation, prior to Burkey's 2015 re-trial, of a potential witness, on a separate matter. Br. of Pet. at 5-10. Notably, that "witness," Mr. Kinard, did not testify in Burkey's first trial in 2006 and was in jail at the time of the murder. RP 463.

As to attorney Maxey's representation of Terrance Kinard on drug charges arising some ten years after the murder of Tiwater, the following timeline establishes that representation occurred before Burkey's trial:

1. July 2, 2015, Kinard was charged with two counts of possession of a controlled substance with the intent to deliver, both occurring the day before, on July 1, 2015. Attach. 1 (Information).

2. July 27, 2015, attorney Maxey substituted as counsel for Kinard's court appointed attorney, Colin Charbonneau. Attach. 2 (Order Allowing Substitution of Counsel).
3. October 21, 2015, Kinard was federally indicted on five counts. Attach. 4 (U.S. Criminal Docket for *USA v. Kinard, et. al.*).
4. October 30, 2015, The charges involving attorney Maxey's representation of Kinard were dismissed ending Maxey's representation of Kinard. Attach. 3.
5. The Federal Defender represented Kinard at all times on the federal charges. Attach. 4.
6. Burkey's second trial began on December 7, 2015. RP 14.

In support of his claim of ineffective assistance of counsel, Burkey provides a declaration. Br. of Pet. at Ex. A-48-52. Therein, he states he had often discussed his desire to call Kinard as a witness for his first trial in 2006 with his attorney for that trial, Tracy Collins. Br. of Pet. at Ex. A-49, #12. He did not know why Mr. Collins did not call Kinard. *Id.*

Burkey also claims he discussed his desire to have Kinard testify during the eight years he was represented by attorney Maxey on appeal after his first trial, from October 2006 to May 2015. Br. of Pet. at Ex. A-49-50.

In most part, the other statements made in Burkey's declaration are hearsay or involve speculation. If a petition is based on matters outside the appellate record, a petitioner must show that he has "competent, admissible

evidence” to support his arguments. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). This Court can disregard a defendant’s self-serving assertions included in a personal restraint petition. *See In re Pers. Restraint of Yates*, 180 Wn.2d 33, 43-44, 321 P.3d 1195 (2014) (Stephens, J., concurring) (“[W]e need not accept at face value Yates’ self-serving statement, made years after the fact”). As this Court noted, hearsay remains inadmissible under *Rice*, and is not a basis for granting a reference hearing or other relief in a personal restraint petition. *Matter of Moncada*, 197 Wn. App. 601, 391 P.3d 493 (2017). These statements are objected to as follows using the enumeration provided by Burkey in his declaration:¹²

2. Hearsay. [In August of 2005 my sister, Glenna Joseph, introduced me to Rick Tiwater and asked me to help him with some of his problems.]
4. Hearsay. [Mr. Tiwater told me that he had made a deal with the police to do a controlled buy from Terrance Kinard.]
5. Hearsay. [Mr. Tiwater went on to tell me that he told Mr. Kinard of the deal he had made with the Spokane police, and that his plan was to run on his four counts and not go through with the deal with the police.]
6. Hearsay. [Mr. Tiwater then called Mr. Kinard in my presence to confirm to me that Mr. Kinard knew of what he had done with the police and that his intentions were to run on his charges and not go through with the deal with the police.]

¹² Br. of Pet. at Ex. A-48-52.

7. Hearsay. [Mr. Kinard then asked me to help Mr. Tiwater obtain the things he would need to be able to leave town.]
10. Speculation as to whether anyone had interviewed Kinard.
11. Speculation as to what his defense was when he testified that his defense to the murder was he was merely present and was in fear of Tesch.
19. Hearsay as to what he and his attorney Maxey discussed.
20. Hearsay as to what he and his attorney Maxey discussed.
21. Hearsay as to what he and his attorney Maxey discussed.
22. Speculation.
23. Hearsay as to what he and his attorney Maxey discussed.
24. Hearsay as to what he and his attorney Maxey discussed.
25. Speculation as to what arguments were or were not part of the jury's determination.
26. Speculation.
27. To the extent Burkey attests to the number of times Conard's (or Kinard's) name is mentioned, it is readily apparent that it was mostly mentioned in opening statement of the defendant and in closing argument of the defendant, and that Burkey is the only one that brought the name up, both when he talked to the police, and was then apprised that at all relevant times this person, Conard or Kinard, was in jail. RP 463.
28. Speculation as to the outcome of the trial would be different.

1. Standard of review for alleged conflicts of interest.

This court reviews whether circumstances demonstrate a conflict of interest de novo. *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008). This court will not find an actual conflict unless petitioner can point to specific instances in the record to suggest an actual conflict or impairment of their interest. *State v. James*, 48 Wn. App. 353, 366, 739 P.2d 1161 (1987); *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983). Where, as here, the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict that adversely affected the lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). An "actual conflict" is a term of legal art, requiring a "conflict that affected counsel's performance - as opposed to a mere theoretical division of loyalties." *Regan*, 143 Wn. App. at 427-28 (quoting *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)). "Possible or theoretical conflicts of interest are 'insufficient to impugn a criminal conviction.'" *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 349, 325 P.3d 142 (2014) (quoting *Cuyler v. Sullivan*, 446 U.S. at 350). Until a petitioner shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of

ineffective assistance. *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

2. Discussion.

In *Mickens v. Taylor, supra*, petitioner Mickens was convicted of the premeditated murder of Timothy Hall, and was sentenced to death. The petitioner's attorney, Bryan Saunders, had represented Hall on assault and concealed-weapons charges *at the time of the murder*. The same juvenile court judge who dismissed the charges against Hall later appointed Saunders to represent petitioner. Saunders did not disclose to the court, his co-counsel, or petitioner that he had previously represented Hall. The Court found that since this was not a case in which counsel or defendant made the court aware of a potential conflict it was at least necessary, to void the conviction, for petitioner to establish that the conflict of interest *adversely affected his counsel's performance*. Because the lower court found no such adverse performance, the petitioner's conviction was affirmed. *Mickens v. Taylor*, 535 U.S. at 173-74.

In *Dhaliwal, supra*, Dhaliwal was charged with murder of a fellow cab driver of Farwest Cab Company. Dhaliwal was represented at trial by attorney Salazar. On review, Dhaliwal argued that Salazar's performance

was affected by his dual representation of Dhaliwal and Sohal¹³ because Salazar failed to object to various hearsay statements and testimony about Dhaliwal's prior bad acts during Sohal's testimony. Our State Supreme Court found the failure to object to testimony did not indicate Salazar was operating under a conflict because there are numerous tactical reasons for not objecting to testimony. 150 Wn.2d at 573. The Court noted that in its analysis of ineffective assistance of counsel claims, it had been reluctant to find counsel's performance deficient solely on the basis of questionable trial tactics. *Id.*

In *Sullivan*, the United States Supreme Court found that the trial attorney's tactical decision to rest Sullivan's defense was a reasonable response to the weakness of the prosecutor's case rather than evidence of a conflict of interest. 446 U.S. at 347-48, 100 S.Ct. 1708. Similarly, Salazar's failure to object to testimony is a tactical decision that, without more, does not indicate that he was acting under a conflict of interest. This is not a case where the defendant's attorney utterly failed to make any objections, to cross examine the State's witnesses, or to mount a defense.

Under *Mickens* and *Sullivan*, the defendant bears the burden of proving that there was an actual conflict that adversely affected his or her lawyer's performance. *Mickens*, 535 U.S. at 174, 122 S.Ct. 1237; *Sullivan*, 446 U.S. at 350, 100 S.Ct. 1708. Holding that the *possibility* of a conflict was not enough to warrant reversal of a conviction, the *Sullivan*

¹³ Salazar was also simultaneously representing several of the State and defense witnesses in civil litigation involving Farwest. He had also previously represented two of the witnesses on an assault charge in which Dhaliwal had been a codefendant. *Dhaliwal*, 150 Wn.2d at 562.

Court stated: “[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” *Id.* at 350, 100 S.Ct. 1708. Here, Dhaliwal has demonstrated the possibility that his attorney was representing conflicting interests. However, he has failed to establish an actual conflict because he has not shown how Salazar’s concurrent representation of the witnesses involved in the shareholder action and his prior representation of Grewal affected Salazar’s performance at trial.

Dhaliwal, 150 Wn.2d at 573.

Here, Burkey fails to establish a conflict of interest from attorney Maxey’s representation of Kinard on a totally unrelated drug case occurring some ten years after the Tiwater murder, where Maxey’s representation of Kinard ended before the trial. Even assuming Burkey has demonstrated the *possibility* that Maxey was representing conflicting interests, here, as in *Dhaliwal*, he has failed to establish an actual conflict because he has not shown how Maxey’s prior representation of Kinard in the dismissed 2015 drug case affected Maxey’s performance at trial.

Moreover, as in *Dhaliwal* and *Mickens*, there are many tactical reasons for not calling Kinard as a witness at the second trial. As in *Mickens*, Burkey had *set his defense* by testifying in his first trial.¹⁴ His overarching

¹⁴ As Justice Kennedy noted in his concurring opinion in *Mickens v. Taylor*, 535 U.S. 162:

Petitioner’s description of roads not taken would entail two degrees of speculation. We would be required to assume that

defense for being merely present at the drawn-out beatings and murder beginning at *his house* and later, by transportation provided by Burkey's vehicle, to a deserted location in Elk, and for his inability to later report the murder, was the inexplicable rage of Tesch and Tesch's dislike for Tiwater. Moreover, he originally distanced himself from any connection with Kinard, indeed testifying that, on the day of the murder, Kinard or his people were surveilling him in a threatening manner and that Tesch came over to back Burkey up in case there was trouble, which position is diametrically opposed to his newly suggested agreement with Kinard that Tiwater was leaving town.¹⁵ The lack of closeness with Kinard was part of this defense, placing him as an opponent, not a confidant.

Saunders believed he had a continuing duty to the victim, and we then would be required to consider whether in this hypothetical case, the counsel would have been blocked from pursuing an alternative defense strategy. The District Court concluded that the prosecution's case, coupled with the defendant's insistence on testifying, foreclosed the strategies suggested by petitioner after the fact.

¹⁵ Prior to his arrest on September 16, Burkey initially told police that he had not seen Tiwater since September 3, 2005. RP 296, 322. On September 26 he next told a detective that Tiwater was at his place on September 4 and that he had seen Kinard (who was actually in jail on September 4, 2005), RP 463-64, and other "black men" watching the house. He called Tesch for "back-up." Ex. 137 at 15. However, Tesch did not like Tiwater and eventually assaulted him. He and Tesch then decided to drive Tiwater home, but instead Tesch drove up north and assaulted and killed Tiwater. RP 463-470. Burkey testified that Tesch murdered Tiwater on his own and had threatened the lives of Burkey and his son if Burkey did not cooperate in covering up the crime. Ex. 137 at 15, 18-31, 34-38. Additionally, Burkey testified that he had no idea whether Kinard knew Tiwater was at Burkey's house. Ex. P-137 at 56.

Attorney Maxey called additional witnesses, not called in the first trial, to support Burkey's claim that he was attempting to help Tiwater. CP 93. He called a respected attorney, Patrick Stiley, to establish that Burkey had taken Tiwater to Mr. Stiley's Idaho cabin to get advice from Mr. Stiley as to his options with his pending charges, including the option of leaving town. RP 507-516. A noted defense attorney may be a better witness than a federally indicted felon. That is a clear tactical decision. Maxey also called Ms. Becky Gibbs to establish that Tesch was an intimidating man and would threaten to hurt other people's kids. RP 534-37.

Mr. Maxey was the attorney responsible for having Burkey's case reversed on appeal, and stood by Burkey throughout that arduous process as well as the retrial. The record reveals that attorney Maxey zealously advocated on Burkey's behalf. Maxey was very familiar with the record and the set defense. The decisions of which witnesses to call is a strategic one generally within those delegated to the attorney. *See Grier*, 171 Wn.2d at 30-31; *State v. Statler*, 160 Wn. App. 622, 636, 248 P.3d 165 (2011).

Burkey's claim has failed to establish but "a mere theoretical division of loyalties," *Regan*, 143 Wn. App. at 427-28. There was no actual conflict. Burkey has not shown how Maxey's prior representation of Kinard in the dismissed 2015 drug case affected Maxey's performance at his trial.

As in *Mickens*, Burkey's "description of roads not taken would entail two degrees of speculation."

B. BURKEY'S CLAIM THAT HIS CONVICTIONS MUST BE SET ASIDE BECAUSE HIS GIRLFRIEND PRESENTED PERJURED TESTIMONY AT TRIAL FAILS TO ESTABLISH EITHER THAT PERJURY OCCURRED OR THAT THERE IS A REASONABLE LIKELIHOOD THAT THE FALSE TESTIMONY COULD HAVE AFFECTED THE JUDGMENT OF THE JURY.

Burkey claims his girlfriend Ms. Lascelles gave perjured or unreliable testimony. In support of this claim, he establishes that the State was disgruntled with Ms. Lascelles' favorable testimony given at his trial and that the State brought perjury charges against her, charges that were ultimately dismissed. It is more than interesting that the failed perjury allegation was based totally on Lascelle's *favorable* testimony for Burkey:¹⁶

The defendant testified at Tesch's trial she saw Burkey attempting to clean blood off the floor in the kitchen by trying to mop it up with a sheet and a towel that he was rubbing around on the floor with his foot. During Burkey's trial, the defendant denied that she ever saw Burkey attempt to clean up the blood on the kitchen floor.

The second occurrence was during her testimony regarding Burkey bringing the victim's chaps back into the house upon Burkey and Tesch's return to the house after the victim was killed and his body was dumped in a wooded area in North Spokane County. The defendant testified at Tesch's trial that Tesch brought the victim's leather coat into the house and that Burkey brought the victim's chaps in and put them on top of the victim's coat. During Burkey's trial, the defendant

¹⁶ See Attach. 5 at 4-6 (*State v. Patricia Ann Lascelles*, State's Memorandum for Perjury in the First Degree).

testified that Tesch brought both the victim's coat and chaps into the house and that she did not see Burkey carry anything in and denied recalling testifying to such at Tesch's trial.

The third occurrence was during her testimony regarding who gave her twenty dollars to be spent on cleaning the vehicle the victim was transported in and run over with. The defendant testified at Tesch's trial that upon returning to the house after killing the victim, Tesch ordered her to clean the car inside and out, and Burkey gave her twenty dollars and told her to leave. During Burkey's trial, the defendant testified that Tesch gave her twenty dollars with which to clean the car and denied testifying previously that it was Burkey who gave her the money to clean the car.

The fourth occurrence was during her testimony regarding whether Burkey instructed her what to say to law enforcement about the victim's murder. The defendant testified at Tesch's trial that Burkey directed her what to say to police. During Burkey's trial the defendant testified (sic) that Burkey never instructed her what to tell the police.

Attach. 5 at 4-6.

Because Burkey can neither establish perjury, nor harm, his claim must fail.

A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *In re Benn*, 134 Wn.2d at 936-37. Burkey admits that there was no finding of perjury. Br. of Pet. 13. He then claims that the testimony was unreliable. *Id.* He claims that "even if the government unwittingly presents false evidence," it is grounds for reversal, relying on *United States v. Young*,

17 F.3d 1201, 1204 (9th Cir. 1994). Br. of Pet. 11. This ground, and indeed the very Ninth Circuit decision Burkey relies on for relief, was specifically rejected in *Benn*. See *Benn*, 134 Wn.2d at 937.

Burkey fails to establish any prejudice in the introduction of Ms. Lascelles' testimony; he only speculates that "without her testimony, the State really did not have a case." Br. of Pet. 14. Burkey has not established that the State knowingly used perjured testimony, nor does he engage in any meaningful legal analysis to support the prejudice prong of his claim. In order to obtain relief by means of a PRP, a petitioner must demonstrate that he or she is under restraint and that the restraint is unlawful. *In re Pers. Restraint of Wheeler*, 188 Wn. App. 613, 616, 354 P.3d 950 (2015). To show the restraint is unlawful, a petitioner must either show that a constitutional error occurred that resulted in actual and substantial prejudice, or a nonconstitutional error occurred that constituted a fundamental defect and resulted in a complete miscarriage of justice. *Id.* at 617; *In re Pers. Restraint of Gentry*, 170 Wn.2d 711, 714, 245 P.3d 766 (2010). Burkey provides no argument in this regard. This Court should decline to address this issue. RAP 10.3(a)(6), 16.10(d).

C. BURKEY’S CLAIM HE WAS DENIED HIS STATE AND FEDERAL RIGHT TO A FAIR TRIAL WITH DUE PROCESS WHEN THE TRIAL COURT ERRED BY PRESENTING A JURY INSTRUCTION THAT WAS AMBIGUOUS AND MISSTATED THE LAW IS WITHOUT MERIT.

Burkey claims the instruction 12 regarding accomplice liability was improper. First, this was the instruction he proposed so any error was invited. “The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create.” *Carson*, 179 Wn. App. At 973. Moreover, the instruction sets forth the requirement that the defendant must have the “knowledge that it will promote or facilitate the commission of the *specific* crime charged,” which more than complies with *State v. Cronin*, 142 Wn.2d 568, 578-80, 14 P.3d 752 (2000) and *State v. Roberts*, 142 Wn.2d 471, 510-13, 14 P.3d 713 (2000). There is no error in this regard.

D. BURKEY’S CLAIM HIS RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE STATE’S IMPROPER CLOSING IS ALSO WITHOUT MERIT.

Burkey spends many pages in his petition arguing that the State’s closing argument misrepresented the facts. Br. of Pet. 19-37. He acknowledges the trial court instructed the jury that:

The lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark,

statement, or argument that is not supported by the evidence or the law in my instructions.

CP 224 (Court's Instruction No. 1). Most of his argument is his own counter-argument as to what the facts show, generally disregarding any inference from the testimony that may be favorable to the State. What he fails to provide is any discussion, other than in a conclusory fashion, that such claimed errors could not be cured by an instruction, or how that there was a "substantial likelihood" that the challenged comments affected the verdict.

An appellate court does not review a prosecutor's statements in isolation, but rather in the context of the overall argument, the issues in the case, the evidence that was addressed in the argument, and the jury instructions. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). If defense counsel does not object to a prosecutor's comments during closing argument, any error is deemed waived, unless the misconduct was so flagrant and ill-intentioned that no instruction by the trial court could have cured the resulting prejudice. *Id.*; see also *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988). A defendant alleging prosecutorial misconduct bears the burden of first establishing "the prosecutor's improper conduct and, second, its prejudicial effect." *Dhaliwal*, 150 Wn.2d at 578. In this context, "prejudicial effect" means that there was a "substantial

likelihood” that the challenged comments affected the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Moreover, the jurors were specifically instructed to “disregard any remark, statement, or argument that is not supported by the evidence or the law in [its] instructions.” Even assuming part of the State’s argument was improper, the trial court’s instruction was presumptively followed. The appellate courts presume that the jury follows the trial court’s instructions unless there is evidence to the contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). There is no evidence here to the contrary.

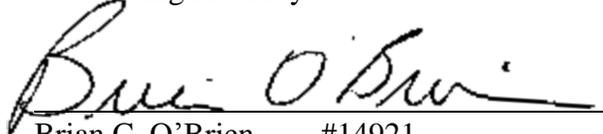
Burkey fails to prove that the prosecutor’s statements could not be curable by additional instructions, or that the statements resulted in prejudice, affected the verdict, and denied him a fair trial.

VII. CONCLUSION TO PERSONAL RESTRAINT PETITION

In light of the above, Burkey’s personal restraint petition should be dismissed.

Dated this 8 day of May, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brian C. O’Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

ATTACHMENT 1

FILED

JUL 02 2015

SPOKANE COUNTY CLERK

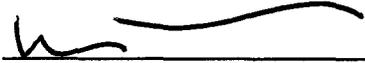
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON	)	INFORMATION
	)	(INFO)
Plaintiff,	)	No. 15-1-02470-2
)	
v.	)	PATRICK T. JOHNSON
	)	Deputy Prosecuting Attorney
TERRENCE ANTHONY KINARD)	
BM 06/13/57	)	PA# 15-9-57286-0
Defendant(s).	)	RPT# CT I, II: 002-15-0801278
	)	RCW CT I, II: 69.50.401(1)(2)(A/B)PD-F
	)	(#56210)

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, committed as follows: That the defendant, TERRENCE ANTHONY KINARD, in the State of Washington, on or about July 01, 2015, did unlawfully possess, with intent to deliver a controlled substance, to-wit: Heroin,

COUNT II: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, committed as follows: That the defendant, TERRENCE ANTHONY KINARD, in the State of Washington, on or about July 01, 2015, did unlawfully possess, with intent to deliver a controlled substance, to-wit: Methamphetamine,

FOR  32130
Deputy Prosecuting Attorney
WSBA #28211

DEFENDANT INFORMATION:	TERRENCE ANTHONY KINARD	
Address:	1914 E 4TH AVE SPOKANE WA 99202-3210	
Height:	5'09"	Weight: 230
Eyes:	Bro	DOL #: KINARTA433LL
SID #:	010787047	DOC #: 630345
		Hair: Bk
		State: WA
		FBI NO. 596330P4

ATTACHMENT 2

FILED

JUL 27 2015

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE SPOKANE COUNTY**

STATE OF WASHINGTON,)	
)	
Plaintiff,	)	NO. 15-1-02470-2
)	
vs.	)	ORDER ALLOWING
	)	SUBSTITUTION OF
TERRENCE KINARD,	)	COUNSEL
)	
Defendant.)	

I. BASIS

The Defendant moved the court for an order allowing substitution of counsel.

II. FINDINGS

After reviewing the files and records herein the court finds that good cause exists for the entry of this order as withdrawing counsel agrees to the same and new counsel has been retained.

III. ORDER

IT IS HEREBY ORDERED that Bevan J. Maxey is allowed to substitute as counsel for the defendant effective immediately.

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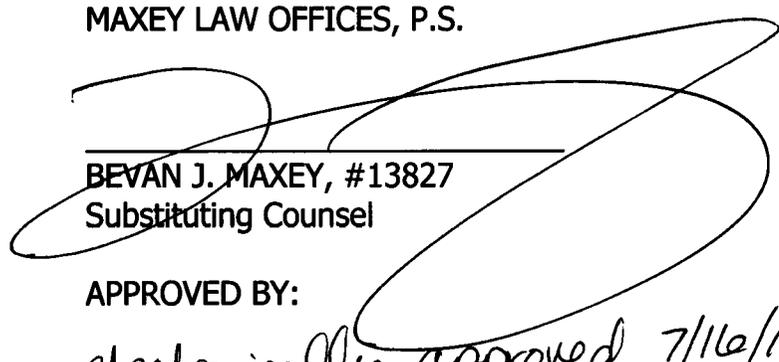
DONE IN OPEN COURT this 27 day of July, 2015.



JUDGE/COURT COMMISSIONER
GREGORY D. SYBOLT

PRESENTED BY:

MAXEY LAW OFFICES, P.S.



BEVAN J. MAXEY, #13827
Substituting Counsel

APPROVED BY:

electronically approved 7/16/15

COLIN CHARBONNEAU, # 37563
Withdrawing Attorney

Electronically approved 7/16/15

PATRICK T. JOHNSON, #28211
Deputy Prosecuting Attorney

ATTACHMENT 3

Therefore, upon hearing the above motion for dismissal,

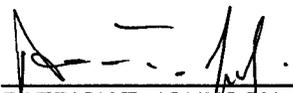
IT IS HEREBY ORDERED that said charge of CT I, II: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, and the same is hereby dismissed, and the defendant, TERRENCE ANTHONY KINARD, and his sureties released from any further liability herein.

DONE IN OPEN COURT this 28 day of October, 2015.



JUDGE

Presented by:



PATRICK T. JOHNSON
Deputy Prosecuting Attorney
WSBA # 28211

ATTACHMENT 4

O'Brien, Brian

From: Harrington, Joseph H. (USAWAE)
Sent: Thursday, April 20, 2017 3:55 PM
To: O'Brien, Brian
Subject: copy of docket

**Eastern District of Washington
U.S. District Court (Spokane)
CRIMINAL DOCKET FOR CASE #: 2:15-cr-00118-WFN-1**

Case title: USA v. Kinard et al

Date Filed: 10/21/2015

Date Terminated: 02/13/2017

Assigned to: Senior Judge Wm. Fremming
Nielsen

Defendant (1)

Terrence Anthony Kinard
TERMINATED: 02/13/2017

represented by **Amy H Rubin**
Federal Defenders - SPO
Eastern Washington
North 10 Post Street
Suite 700
Spokane, WA 99201
509-624-7606
Fax: 15097473539
Email: amy_rubin@fd.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
*Designation: Public Defender or Community
Defender Appointment*

Federal Public Defender - SPO
Spokane Office
North 10 Post
Suite 700
Spokane, WA 99201
509-624-7606
Fax: 15097473539
Email: andrea_george@fd.org
TERMINATED: 11/05/2015
*Designation: Public Defender or Community
Defender Appointment*

Pending Counts

21 U.S.C. 846 CONSPIRACY TO DISTRIBUTE 5 GRAMS OR MORE OF PURE (ACTUAL) METHAMPHETAMINE (1)

21 U.S.C. 841(a)(1) DISTRIBUTION OF A MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF HEROIN (2-3)

Disposition

120 Months Imprisonment Concurrent to Counts 2 and 3, 4 Years Supervised Release Concurrent to Counts 2 and 3, Fine Waived, \$100 Special Assessment

120 Months Imprisonment on each Count Concurrent to Count 1, 3 Years Supervised Release on each Count Concurrent to Count 1, Fine Waived, \$200 Total Special Assessment

Highest Offense Level (Opening)

Felony

Terminated Counts

21 U.S.C. 841(a)(1) POSSESSION WITH INTENT TO DISTRIBUTE A MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF METHAMPHETAMINE (4)

21 U.S.C. 841(a)(1) POSSESSION WITH INTENT TO DISTRIBUTE A MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF HEROIN (5)

Disposition

Dismissed

Dismissed

Highest Offense Level (Terminated)

Felony

Complaints

None

Disposition

Plaintiff

USA

represented by **Scott Travis Jones**
U S Attorney's Office - SPO
920 W Riverside Suite 300
P O Box 1494
Spokane, WA 99210-1494
509-353-2767
Fax: 509-835-6397
Email: USAWAE.SJonesECF@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jared C Kimball

U S Attorney's Office - SPO
 920 W Riverside Suite 300
 P O Box 1494
 Spokane, WA 99210-1494
 509-353-2767
 Fax: 4623866
 TERMINATED: 08/05/2016
 Designation: Assistant US Attorney

Date Filed	#	Docket Text
10/21/2015	<u>1</u>	INDICTMENT as to Terrence Anthony Kinard (1) counts 1, 2-3, 4, 5, Courtney Vontrelle Harvey (2) count 1. (JW, Operations Clk) (Entered: 10/21/2015)
10/21/2015	<u>3</u>	Penalty Slip - FORFEITURE NOTICE - as to Terrence Anthony Kinard (1) (JW, Operations Clk) (Entered: 10/21/2015)
11/04/2015	7	NOTICE OF HEARING - By Court as to Terrence Anthony Kinard (1). Text entry; no PDF attached. Arraignment/Initial Appearance set for 11/4/2015 at 1:30 PM in Spokane Courtroom 740, by video conference, before Magistrate Judge James P. Hutton. (MO, Courtroom Deputy) Modified on 11/4/2015 to correct typographical error (MO, Courtroom Deputy). (Entered: 11/04/2015)
11/04/2015	<u>8</u>	MOTION for Detention by USA as to Terrence Anthony Kinard (1). (Kimball, Jared) (Entered: 11/04/2015)
11/04/2015	9	ORDER APPOINTING FEDERAL DEFENDER as to Terrence Anthony Kinard (1). On the basis of the sworn financial statement, the court finds Defendant is financially unable to retain counsel. IT IS ORDERED the Federal Defenders of Eastern Washington are appointed to represent Defendant pursuant to Title 18 United States Code Sec. 3006A Appointed Federal Public Defender - SPO for Terrence Anthony Kinard - Text entry;no PDF document will issue. This text-only entry constitutes the court order on the matter. Signed by Magistrate Judge James P. Hutton. (ASV,) (Entered: 11/04/2015)

O'Brien, Brian

From: Harrington, Joseph H. (USAWAE)
Sent: Thursday, April 20, 2017 4:00 PM
To: O'Brien, Brian
Subject: docket

11/04/2015	<u>9</u>	ORDER APPOINTING FEDERAL DEFENDER as to Terrence Anthony Kinard (1). On the basis of the sworn financial statement, the court finds Defendant is financially unable to retain counsel. IT IS ORDERED the Federal Defenders of Eastern Washington are appointed to represent Defendant pursuant to Title 18 United States Code Sec. 3006A Appointed Federal Public Defender - SPO for Terrence Anthony Kinard - Text entry;no PDF document will issue. This text-only entry constitutes the court order on the matter. Signed by Magistrate Judge James P. Hutton. (ASV,) (Entered: 11/04/2015)
11/04/2015	<u>10</u>	Minute Entry for VIDEO CONFERENCE proceedings held before Magistrate Judge James P. Hutton: Arraignment/Initial Appearance held on 11/4/2015 as to Terrence Anthony Kinard (1). Not Guilty plea entered as to Counts 1,2-3,4,and 5. (Reported/Recorded by: FTR/S-740) (MO, Courtroom Deputy) (Entered: 11/04/2015)
11/04/2015	<u>11</u>	ORDER Following Arraignment/Initial Appearance (USM Action Required) as to Terrence Anthony Kinard (1). Bail Hearing/Motion for Detention <u>8</u> hearing set for 11/9/2015 at 01:30 PM in Spokane Courtroom 740 before Magistrate Judge John T. Rodgers. Signed by Magistrate Judge James P. Hutton. (SK, Case Administrator) (Entered: 11/04/2015)
11/04/2015	<u>12</u>	ACKNOWLEDGMENT OF NOTICE OF RIGHTS - Indictment by Terrence Anthony Kinard (1). (SK, Case Administrator) (Entered: 11/04/2015)
11/04/2015	<u>13</u>	ASSERTION OF FIFTH AND SIXTH AMENDMENT RIGHTS by Terrence Anthony Kinard (1). (SK, Case Administrator) (Entered: 11/04/2015)
11/05/2015	<u>15</u>	NOTICE SETTING HEARINGS - By Court - Text entry; no PDF document - as to Terrence Anthony Kinard (1). An expedited First Pretrial Conference is set for 11/18/2015 at 11:00 AM ; a Final Pretrial Conference and Motion Hearing is set for 1/11/2016 at 11:00 AM and the Jury Trial is set for 1/11/2016 at 1:00 PM . All proceedings will be held in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (JLK, Courtroom Deputy) (Entered: 11/05/2015)
11/05/2015	<u>16</u>	NOTICE OF ATTORNEY APPEARANCE: Amy H Rubin appearing for Terrence Anthony Kinard (1) (Attorney Amy H Rubin added to party Terrence Anthony Kinard(pty:dft))(Rubin, Amy) (Entered: 11/05/2015)
11/05/2015	<u>17</u>	NOTICE of Intent to Withhold Discovery by USA as to Terrence Anthony Kinard (1), Courtney Vontrelle Harvey (2) (Kimball, Jared) (Entered: 11/05/2015)
11/05/2015	<u>18</u>	MOTION for Protective Order by USA as to Terrence Anthony Kinard (1), Courtney Vontrelle Harvey (2). Motion Hearing set for 11/6/2015 Without Oral Argument before Senior Judge Wm. Fremming Nielsen. (Attachments: # <u>1</u> Text of Proposed Order)(Kimball, Jared) (Entered: 11/05/2015)
11/05/2015	<u>19</u>	MOTION to Expedite <i>United States' Motion for Protective Order</i> by USA as to Terrence Anthony Kinard (1), Courtney Vontrelle Harvey (2). Motion Hearing set for 11/6/2015 at 06:30 PM in

		Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (Kimball, Jared) (Entered: 11/05/2015)
11/06/2015	<u>21</u>	Arrest Warrant Returned Executed on 11/04/2015 as to Terrence Anthony Kinard (1). (AY, Case Administrator) (AY, Case Administrator). (Entered: 11/06/2015)
11/09/2015	<u>22</u>	Minute Entry for proceedings held before Magistrate Judge John T. Rodgers: Bail Hearing as to Terrence Anthony Kinard (1) held on 11/9/2015. (Reported/Recorded by: FTR/S-740) (MO, Courtroom Deputy) (Entered: 11/09/2015)
11/09/2015	<u>23</u>	ORDER GRANTING UNITED STATES' MOTION FOR DETENTION - granting <u>8</u> Motion for Detention as to Terrence Anthony Kinard (1). Signed by Magistrate Judge John T. Rodgers. (CC, Case Administrator) (Entered: 11/09/2015)
11/12/2015	<u>24</u>	PROTECTIVE ORDER. Granting <u>18</u> Motion for Protective Order as to Terrence Anthony Kinard (1), Courtney Vontrelle Harvey (2); and granting <u>19</u> Motion to Expedite as to Terrence Anthony Kinard (1), Courtney Vontrelle Harvey (2). Signed by Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator) (Entered: 11/12/2015)
11/18/2015	<u>34</u>	Minute Entry for proceedings held before Senior Judge Wm. Fremming Nielsen : Expedited First Pretrial Conference as to Terrence Anthony Kinard (1) and Cortney Vontrelle Harvey (2) held on 11/18/2015. (Reported/Recorded by: Dorothy Stiles) (JLK, Courtroom Deputy) (Entered: 11/18/2015)
11/19/2015	<u>35</u>	ORDER as to Terrence Anthony Kinard (1), and Cortney Vontrelle Harvey (2). Final Pretrial Conference and Trial Date 1/11/16 Confirmed. Pretrial Conference/Motion Hearing set for 12/17/2015 at 10:30 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Signed by Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator) (Entered: 11/19/2015)
12/04/2015	<u>40</u>	MOTION in Limine by USA as to Terrence Anthony Kinard (1), Cortney Vontrelle Harvey (2). Motion Hearing set for 12/17/2015 at 10:30 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (Kimball, Jared) Modified on 12/23/2015 - Motion reset for 3/2/2016 at 09:30 AM Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator). Modified on 3/9/2016 - Motion reset to 6/20/2016 at 11:00 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator). (Entered: 12/04/2015)
12/04/2015	<u>41</u>	First MOTION to Continue <i>Trial</i> by Cortney Vontrelle Harvey (2) as to Terrence Anthony Kinard (1), Cortney Vontrelle Harvey (2). Motion Hearing set for 12/17/2015 at 10:30 AM in Spokane Courtroom 740 before Magistrate Judge John T. Rodgers. (Doll, Kent) (Entered: 12/04/2015)
12/07/2015		Set/Reset Motion Hearing in case as to Terrence Anthony Kinard (1), Cortney Vontrelle Harvey (2) re <u>41</u> First MOTION to Continue <i>Trial</i> . Motion Hearing set for 12/17/2015 at 10:30 AM Spokane Courtroom 903 RESET before Senior Judge Wm. Fremming Nielsen. (JLK, Courtroom Deputy) (Entered: 12/07/2015)
12/17/2015	<u>43</u>	Minute Entry for proceedings held before Senior Judge Wm. Fremming Nielsen : Pretrial Conference and Motion Hearing as to Terrence Anthony Kinard (1) and Cortney Vontrelle Harvey (2) held on 12/17/2015. (Reported/Recorded by: Ronelle F. Corbey) (JLK, Courtroom Deputy) (Entered: 12/17/2015)
12/17/2015	<u>44</u>	WAIVER of Speedy Trial by Terrence Anthony Kinard (1). (SK, Case Administrator) (Entered: 12/17/2015)

12/21/2015	<u>46</u>	ORDER granting <u>41</u> Defendant's Motion to Continue. Excludable delay from 12/4/15 to 12/17/15 and 1/11/16 to 3/21/16 as to Terrence Anthony Kinard (1), Cortney Vontrelle Harvey (2). Jury Trial is reset for 3/21/2016 at 01:00 PM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Pretrial Conference/Motion Hearing set for 3/2/2016 at 09:30 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Final Pretrial Conference/Motion Hearing is reset for 3/21/2016 at 11:00 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Signed by Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator) (Entered: 12/21/2015)
12/21/2015		Reset Motion Hearing in case as to Terrence Anthony Kinard (1), Cortney Vontrelle Harvey (2) re <u>40</u> MOTION in Limine . Motion Hearing reset for 3/2/2016 at 09:30 AM Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator) (Entered: 12/22/2015)
02/02/2016	<u>47</u>	NOTICE RESETTING DATE AND TIME OF HEARING - By Court - Text entry; no PDF document - as to Terrence Anthony Kinard (1) and Cortney Vontrelle Harvey (2). Due to a conflict with the Court's trial calendar, the 3/2/2016 Pretrial Conference and Motion Hearing is STRICKEN and RESET to 3/3/2016 at 8:00 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (JLK, Courtroom Deputy) (Entered: 02/02/2016)
02/05/2016	<u>49</u>	NOTICE of Intent to Rely on FRE 609 Impeachment by USA as to Terrence Anthony Kinard (1), Cortney Vontrelle Harvey (2) (Kimball, Jared) (Entered: 02/05/2016)
02/24/2016	<u>50</u>	NOTICE RESETTING DATE AND TIME OF HEARING - By Court - Text entry; no PDF document as to Terrence Anthony Kinard (1) and Cortney Vontrelle Harvey (2). Due to a change in the Court's trial schedule, the 3/3/2016 Pretrial Conference and Motion Hearing is STRICKEN and RESET to 3/8/2016 at 10:00 AM Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (JLK, Courtroom Deputy) (Entered: 02/24/2016)
03/08/2016	<u>51</u>	Minute Entry for proceedings held before Senior Judge Wm. Fremming Nielsen : Pretrial Conference and Motion Hearing as to Terrence Anthony Kinard (1) and Cortney Vontrelle Harvey (2) held on 3/8/2016. (Reported/Recorded by: Dorothy Stiles) (JLK, Courtroom Deputy) (Entered: 03/08/2016)
03/08/2016	<u>52</u>	WAIVER of Speedy Trial by Terrence Anthony Kinard (1). (SK, Case Administrator) (Entered: 03/08/2016)
03/09/2016	<u>54</u>	ORDER granting <u>48</u> Second MOTION to Continue <i>Trial</i> filed by Cortney Vontrelle Harvey. Excludable delay from 2/5/16 to 3/8/16, and from 3/21/16 to 6/20/16 as to Terrence Anthony Kinard (1), Cortney Vontrelle Harvey (2). Jury Trial is reset to 6/20/2016 at 01:00 PM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Additional Pretrial Conference set for 5/25/2016 at 11:00 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Final Pretrial Conference/Motion Hearing is reset to 6/20/2016 at 11:00 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Government's <u>40</u> Motion Hearing is reset to 6/20/2016 at 11:00 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Signed by Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator) (Entered: 03/09/2016)
05/25/2016	<u>55</u>	Minute Entry for proceedings held before Senior Judge Wm. Fremming Nielsen : Pretrial Conference as to Terrence Anthony Kinard (1) and Cortney Vontrelle Harvey (2) held on 5/25/2016. (Reported/Recorded by: Ronelle F. Corbey) (JLK, Courtroom Deputy) (Entered: 05/25/2016)

05/25/2016	<u>56</u>	ORDER (USM Action Required) as to Terrence Anthony Kinard (1). Change of Plea Hearing set for 6/8/2016 at 02:30 PM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Final pretrial conference and trial date of 6/20/16 is CONFIRMED. Signed by Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator) (Entered: 05/25/2016)
05/31/2016	<u>59</u>	NOTICE RESETTING CHANGE OF PLEA HEARING - By Court - Text entry; no PDF document - as to Terrence Anthony Kinard (1). The 6/8/2016 Change of Plea Hearing is STRICKEN and RESET for 6/7/2016 at 11:00 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (JLK, Courtroom Deputy) (Entered: 05/31/2016)
06/07/2016	<u>60</u>	Minute Entry for proceedings held before Senior Judge Wm. Fremming Nielsen : Pretrial Conference and Motion Hearing as to Terrence Anthony Kinard (1) held on 6/7/2016. (Reported/Recorded by: Ronelle F. Corbey) (JLK, Courtroom Deputy) (Entered: 06/07/2016)
06/07/2016	<u>61</u>	WAIVER of Speedy Trial by Terrence Anthony Kinard (1). (SK, Case Administrator) (Entered: 06/07/2016)
06/07/2016	<u>62</u>	ORDER as to Terrence Anthony Kinard (1). Defendant's oral motion for a trial continuance is GRANTED. Jury Trial reset for 7/18/2016 at 01:00 PM in Spokane Courtroom 903. Pretrial Conference/Motion Hearing set for 7/12/2016 at 09:00 AM in Spokane Courtroom 903. Final Pretrial Conference/Motion Hearing set for 7/18/2016 at 11:00 AM in Spokane Courtroom 903. Motion in Limine <u>40</u> reset to 7/18/2016 at 11:00 AM Spokane Courtroom 903. Excludable delay from 6/20/16 - 7/18/16 as to Terrence Anthony Kinard (1). Signed by Senior Judge Wm. Fremming Nielsen. (VR, Courtroom Deputy) (Entered: 06/07/2016)
07/12/2016	<u>68</u>	ORDER ACCEPTING GUILTY PLEA Terrence Anthony Kinard (1) enters guilty plea on Counts 1, 2 and 3. Signed by Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator) (Entered: 07/13/2016)
07/12/2016	<u>69</u>	ORDER REGARDING SCHEDULE FOR SENTENCING as to Terrence Anthony Kinard (1). Sentencing set for 10/19/2016 at 09:30 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. Signed by Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator) (Entered: 07/13/2016)
07/12/2016	<u>103</u>	PLEA AGREEMENT as to Terrence Anthony Kinard (1). (AY, Case Administrator) (Entered: 02/13/2017)
08/05/2016	<u>72</u>	NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL on Behalf of USA Attorney Jared C. Kimball has withdrawn. Attorney Scott T. Jones is substituted re defendant Terrence Anthony Kinard (1), Cortney Vontrelle Harvey (2) (Attorney Scott Travis Jones added to party USA(pty:pla))(Jones, Scott) (Entered: 08/05/2016)
10/11/2016		Set/Reset Deadlines/Hearings as to Terrence Anthony Kinard (1): Sentencing reset from 10/19/2016 to 12/7/2016 at 10:00 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (JW, Operations Clk) (Entered: 10/11/2016)
11/28/2016		Reset Hearing as to Terrence Anthony Kinard (1): Sentencing set for 2/9/2017 at 10:00 AM in Spokane Courtroom 903 before Senior Judge Wm. Fremming Nielsen. (SK, Case Administrator) (Entered: 11/28/2016)
01/26/2017	<u>97</u>	SENTENCING MEMORANDUM by USA as to Terrence Anthony Kinard (1) (Jones, Scott) (Entered: 01/26/2017)
02/01/2017	<u>98</u>	SENTENCING MEMORANDUM by Terrence Anthony Kinard (1) (Rubin, Amy) (Entered: 02/01/2017)

02/09/2017	<u>102</u>	Minute Entry for proceedings held before Senior Judge Wm. Fremming Nielsen : Sentencing Hearing held on 2/9/2017 for Terrence Anthony Kinard (1): Count 1, 120 Months Imprisonment Concurrent to Counts 2 and 3, 4 Years Supervised Release Concurrent to Counts 2 and 3, Fine Waived, \$100 Special Assessment; Counts 2 and 3, 120 Months Imprisonment on each Count Concurrent to Count 1, 3 Years Supervised Release on each Count Concurrent to Count 1, Fine Waived, \$200 Total Special Assessment; Counts 4 and 5, Dismissed. (Reported/Recorded by: Ronelle F. Corbey) (JLK, Courtroom Deputy) (Entered: 02/09/2017)
02/13/2017	<u>104</u>	JUDGMENT as to Terrence Anthony Kinard (1), Count 1, IMPRISONMENT: 120 Months Concurrent to Counts 2 and 3; SUPERVISED RELEASE: 48 Months Concurrent to Counts 2 and 3, Fine Waived, \$100 Special Assessment; Counts 2-3, IMPRISONMENT: 120 Months on each Count Concurrent to Count 1; SUPERVISED RELEASE: 36 Months on each Count Concurrent to Count 1, Fine Waived, \$200 Total Special Assessment; Counts 4, 5, Dismissed. Signed by Senior Judge Wm. Fremming Nielsen. (AY, Case Administrator) (Entered: 02/13/2017)
02/15/2017	<u>106</u>	Letter from Hon. Wm. Fremming Nielsen to Bureau of Prisons dated February 15, 2017 as to Terrence Anthony Kinard (1). (JLK, Courtroom Deputy) (Entered: 02/15/2017)

ATTACHMENT 5

FILED
MAY 3 1 2007
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON)	
)	
Plaintiff,	)	No. 07-1-00067-5
)	
v.	)	PA# 07-9-260960
)	
PATRICIA ANN. BAILEY	)	STATE'S MEMORANDUM FOR
aka PATRICIA ANN LASCELLES	)	PERJURY IN THE FIRST DEGREE
)	
Defendant.)	

COMES NOW, the State of Washington, represented by Steven J. Tucker, Spokane County Prosecuting Attorney, by and through his Deputy Prosecuting Attorney, Eugene M. Cruz, presents the following memorandum for Perjury in the First Degree.

FACTS

The defendant, Patricia A. Bailey, is charged by information with one count of Perjury in the First Degree. The State alleges that the defendant on or about June 15, 2006, did make a materially false statement while testifying in the criminal trial of Ben Alan Burkey, knowing such statement was false, under an oath required or authorized by law, in an official proceeding. The State is relying on the affidavit of probable cause attested to by

STATE'S SENTENCING MEMORANDUM FOR
PERJURY IN THE FIRST DEGREE.

Page 1
SPOKANE COUNTY PROSECUTING ATTORNEY
COUNTY CITY PUBLIC SAFETY BUILDING
SPOKANE, WA 99260 (509) 477-3662

Attach. 5, p. 1

Spokane County Sheriff Detective Tim Hines, the certificate of Deputy Prosecuting Attorney G. Mark Cipolla, and the verbatim transcripts of the defendant's testimony as a factual basis to support the crime charged. Copies of the affidavit of probable cause and certificate of Deputy Prosecutor Cipolla filed in this case are attached for the Court's convenience. A copy of the verbatim transcript of the defendant's testimony in *State v. James P. Tesch* (Spokane County Superior Court #05-1-03620-7) and *State v. Ben A. Burkey* (Spokane County Superior Court #05-1-03182-5) were previously provided to the court for review. The following legal analysis of this issue is done in a general manner.

ANALYSIS

I. **Statutory requirements for Perjury in the First Degree.**

RCW 9A.72.020(1) reads: "A person is guilty of perjury in the first degree if in any official proceeding [she] makes a materially false statement which [she] knows to be false under an oath required or authorized by law." *Id.* RCW 9A.72.010(1) defines "materially false statement" to mean "any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding; whether a false statement is material shall be determined by the court as a matter of law." *Id.*

The analysis to be applied in determining whether a statement is material was discussed in *State v. Carpenter*, 130 Wash. 23, 225 P. 654 (1924). In *Carpenter*, the court stated,

It has generally been held by the courts and text writers that testimony upon which a charge of perjury may be based need not necessarily be concerning, nor directly relevant to, issues made by the pleadings, but it is sufficient for that purpose if it is material to any question that may properly

arise in the trial of the case. It has also generally been held that perjury may be based on testimony going to the credibility of a witness, and this even though such testimony is legally immaterial or ought not to have been received. The gist of the rule laid down by the authorities is very well stated in 22 A. & E. Ency. Law 687, as follows:

The test of materiality is whether the statement could have influenced the tribunal upon the question at issue before it. Any statements made in a judicial proceeding for the purpose of affecting the decision, and upon which the judge acted, are material. The matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto, or otherwise.

Perjury may be assigned upon false statements affecting only a collateral issue, as the credit of a witness, this being material to the main issue. Thus where, for the purpose of testing his credit, a witness is asked on cross-examination whether he has ever been in prison for a crime or convicted of a felony, the question is material, and a false answer constitutes perjury. But perjury cannot be assigned on the testimony of a witness on cross-examination affecting only his credit, where his evidence on direct examination was immaterial

Id. at 26 – 7.

It should be noted that the “knowledge” requirement regarding a false statement in a perjury case may be inferred from circumstantial evidence. *State v. Olson*, 18 Wn. App. 885, 892, 578 P.2d 866 (1978). Additionally,

It shall be no defense to a prosecution for perjury in the first degree that the defendant did not know the materiality of [her] false statement or that it did not in fact affect the proceeding in or for which it was made. It shall be sufficient that it was material and might have affected the proceedings.

State v. Daniels, 10 Wn. App. 780, 781-2, 520 P.2d 178 (1974).

In *State v. Olson*, 18 Wn. App. 885, 578 P.2d 866 (1978), the court held that in order to convict a person of perjury the State must present: “(1) The testimony of at least one credible witness which is positive and directly contradictory of the defendant’s oath; and (2) Another such direct witness or independent evidence of corroborating

circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and legal presumption of [her] innocence." *Id.* at 888. "Once the two witness rule is satisfied, it is for the jury to decide the trustworthiness of the evidence, what weight it should be accorded and the credibility of the witnesses." *State v. Dial*, 44 Wn. App. 11, 16, 720 P.2d 461 (1986).

In *State v. Stump*, 73 Wn. App. 625 (1994), the court discussed what is required to sustain a perjury conviction.

In order to sustain a perjury conviction, the questions and answers which support the allegation must demonstrate both that the defendant was fully aware of the actual meaning behind the examiner's questions and that the defendant knew [her] answers were not the truth. The questions and answers at issue must be interpreted in the context of what immediately preceded and succeeded them.

Id. at 628 (citations omitted).

In this case, it is undisputed that the defendant testified under oath on June 6, 2006, in the criminal trial of James Tesch and again on June 15, 2006, in the criminal trial of Ben Burkey. The two witness rule as discussed in *State v. Olson*, 18 Wn. App. 885 (1978) is satisfied based on the anticipated testimony of Detective Hines, Deputy Prosecutor Cipolla, as well as the verbatim transcripts of the defendant's testimony from both trials. It is the State's position that the defendant committed perjury at least four times while testifying in Burkey's trial. The defendant's materially false statements were made in response to four areas of questioning that were asked of her. Further, it is the State's position that any one of the defendant's materially false statements independently is sufficient to find that the defendant committed perjury.

The first occurrence was during her testimony regarding seeing Burkey cleaning up or attempting to clean up blood in their house after the victim was assaulted by

Tesch with a hammer. The defendant testified at Tesch's trial she saw Burkey attempting to clean blood off the floor in the kitchen by trying to mop it up with a sheet and a towel that he was rubbing around on the floor with his foot. During Burkey's trial, the defendant denied that she ever saw Burkey attempt to clean up the blood on the kitchen floor.

The second occurrence was during her testimony regarding Burkey bringing the victim's chaps back into the house upon Burkey and Tesch's return to the house after the victim was killed and his body was dumped in a wooded area in North Spokane County. The defendant testified at Tesch's trial that Tesch brought the victim's leather coat into the house and that Burkey brought the victim's chaps in and put them on top of the victim's coat. During Burkey's trial, the defendant testified that Tesch brought both the victim's coat and chaps into the house and that she did not see Burkey carry anything in and denied recalling testifying to such at Tesch's trial.

The third occurrence was during her testimony regarding who gave her twenty dollars to be spent on cleaning the vehicle the victim was transported in and run over with. The defendant testified at Tesch's trial that upon returning to the house after killing the victim, Tesch ordered her to clean the car inside and out, and Burkey gave her twenty dollars and told her to leave. During Burkey's trial, the defendant testified that Tesch gave her twenty dollars with which to clean the car and denied testifying previously that it was Burkey who gave her the money to clean the car.

The fourth occurrence was during her testimony regarding whether Burkey instructed her what to say to law enforcement about the victim's murder. The defendant testified at Tesch's trial that Burkey directed her what to say to police. During Burkey's

trial the defendant testified that Burkey never instructed her what to tell the police.

The State charged Tesch and Burkey as an actor and/or accomplice to a number of crimes. At both Tesch and Burkey's trial, the primary defense strategy was to shift blame to the other co-defendant and distance himself from the criminal activities of the other. Because Tesch and Burkey were charged as accomplices, it was imperative that the State prove during each trial "more than mere presence and knowledge of the criminal activity of another." See WPIC 10.51. The defendant's answers to the four areas of questioning discussed above could have affected the outcome of Burkey's trial.

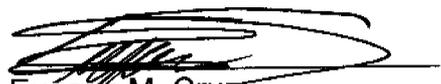
The fact that the defendant's testimony in Burkey's trial did not in fact affect the proceeding in or for which it was made is not a defense to the charge of First Degree Perjury.

CONCLUSION

For the reasons above stated, there is no legal basis for which this court can rule that the defendant did not materially breach the plea agreement to testify truthfully in Burkey's trial. The defendant provided perjured testimony in four areas of questioning. Any one of the defendant's materially false statements independently is sufficient to find that the defendant committed perjury. Judicially recognized interests in fair and efficient administration of justice require this court to rule as requested.

Respectfully submitted this 31st day of May 2007.

Steven J. Tucker
Spokane County Prosecuting Attorney


Eugene M. Cruz
Deputy Prosecuting Attorney WSBA #27114

PROSECUTOR _____

REPORT NO. 05-285164

SUMMARY OF FACTS

State of Washington)

)

ss. Patricia A. Lascelles, w/f, dob 12-03-70

County of Spokane)

The undersigned, being competent to testify and sworn on oath, deposes and testifies that he believes that a crime was committed by the defendant/defendants in the County of Spokane, State of Washington, because:

Detective Tim Hines will testify that he was the lead Detective in the investigation into the death of Rick L. Tiwater that began on 09-05-05 when Tiwater's body was found in northern Spokane County; that as a result of the investigation, James P. Tesch and Benjamin A. Burkey were arrested and charged with numerous crimes including first degree murder; that Benjamin Burkey's live-in girlfriend at the time of these crimes, Patricia A. Lascelles, was determined to be a material witness to the assault on Tiwater prior to his death that occurred in she and Burkey's residence at 1412 E. Ostrander, and was called by the prosecution to testify for the state in the trials of both suspects; that he was present in the courtroom on 06-06-06 when Patricia A. Lascelles testified on behalf of the State of Washington in James P. Tesch's jury trial, and on 06-15-06 when she testified on behalf of the State of Washington in Benjamin A. Burkey's jury trial; that in her testimony during the Burkey trial, he heard Lascelles testify differently than she testified during the Tesch trial on three occasions regarding Burkey's participation in the events of the night Tiwater was murdered; that on 10-09-06 he reviewed the typed transcripts of the testimony Patricia A. Lascelles provided on 06-06-06 in the trial of James P. Tesch, and the typed transcripts of the testimony she provided on 06-15-06 in the trial of Benjamin A. Burkey; that as a result of the review of the transcripts from both trials, he noted that Patricia Lascelles committed perjury on three separate occasions during her testimony in the Burkey trial; that the first occurrence was during her testimony regarding seeing Burkey cleaning up or attempting to clean up blood in their house on Ostrander after Tiwater was assaulted by Tesch with a hammer;

that according to the transcripts, Lascelles testified during the Tesch trial that prior to Burkey and Tesch leaving the Ostrander house with Tiwater, she saw Ben Burkey attempting to clean blood off the floor in the kitchen by trying to mop it up with a sheet and a towel he was rubbing around on the floor with his foot; that according to the transcripts, when asked about this during the Burkey trial, Lascelles denied that she ever saw Burkey attempt to clean up the blood on the kitchen floor; that the second occurrence was during her testimony regarding Burkey bringing Tiwater's riding chaps back into the house upon he and Tesch's return to the house after Tiwater had been killed; that according to the transcripts, Lascelles testified during Tesch's trial that Tesch brought Tiwater's leather coat into the house and put it on the kitchen floor after which time Burkey brought Tiwater's chaps in and put them on top of Tiwater's coat; that according to the transcripts, Lascelles testified during the Burkey trial that Tesch carried Tiwater's coat and chaps into the house, and that she didn't see Burkey carry anything in and denied recalling testifying to such previously; that the third occurrence was during her testimony regarding who gave her twenty dollars to use to clean the vehicle Tiwater was transported in and run over with; that according to the transcripts, Lascelles testified during the Tesch trial that upon returning to the house after killing Tiwater, Tesch ordered her to clean the car inside and out, and Burkey gave her twenty dollars and told her to leave; that according to the transcripts, Lascelles testified during the Burkey trial that it was Tesch that gave her twenty dollars with which to clean the car, and denied testifying previously that it was Burkey that gave her the twenty dollars; that at the end of her testimony in the Burkey trial Lascelles testified that she still loved Ben Burkey and didn't want to see anything happen to him; that based on Lascelles' romantic relationship with Ben Burkey at the time of the incident and trial, and the nature of the testimony she gave, there is probable cause to believe that Lascelles intentionally committed the crime of perjury during Burkey's trial in an attempt to minimize his involvement in the murder of Rick Tiwater; that these crimes occurred in Spokane County Washington; that he prepared this affidavit.

I HEREBY CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT. 9A.72.085

DATE 10-10-06 PLACE Spokane, WA SIGNATURE 

6. At the trial for Ben Burkey, it appeared that Ms. Lascelles was changing her prior testimony;
7. That I requested the court inquire of Ms. Lascelles if she wished to speak with her attorney before proceeding. She responded in the negative;
8. That upon further questioning, the witness continued to change certain parts of her testimony;
9. That I informed Mr. Citutovich that it was the State's belief that his client had violated the agreement by not testifying truthfully and that his client was going to be charged;
10. At some point Mr. Citutovich withdrew as the witness' attorney and Mr. John Nollette was appointed;
11. That I informed Mr. Nollette that if his client was not accepting any offers, the State was going to add additional charges including Murder. That Mr. Nollette informed me that his client was not going to accept any offers;
12. The State filed a motion to amend and a new Information charging one count of Perjury based upon the transcripts of Ms. Lascelle's testimony and the affidavit of Tim Hines; and
13. That Mr. Cruz was not present when the plea agreement was made. That Detective Hines was informed by telephone of the agreement.

I certify that the foregoing is true and correct.

Dated this 24th day of January 2007 in Spokane, Washington.


G. Mark Cipolla,
Deputy Prosecuting Attorney
WSB # 22202

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

BEN A. BURKEY,

Appellant,

In Re Personal Restraint of:

BEN A. BURKEY

Petitioner.

NO. 34093-7-III
Consol w/34956-0-III

CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 8, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jill Shumaker Reuter and Kristina M. Nichols
Wa.appeals@gmail.com; admin@ewalaw.com; jill@ewalaw.com

and mailed a copy to:

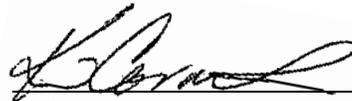
Ben A. Burkey, DOC 275919
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

5/8/2017

(Date)

Spokane, WA

(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

May 08, 2017 - 11:52 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34093-7
Appellate Court Case Title: State of Washington v. Ben Alan Burkey
Superior Court Case Number: 05-1-03182-5

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